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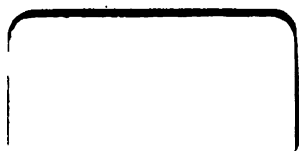
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THE
AMERICAN DECISIONS

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

DECIDED IN

THE COURTS OF THE SEVERAL STATES

FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO
THE YEAR 1869.

COMPILED AND ANNOTATED

BY A. C. FREEMAN,

COUNSELLOR AT LAW, AND AUTHOR OF "TREATISE ON THE LAW OF JUDGMENTS,"
"CO-TENANCY AND PARTITION," "EXECUTIONS IN CIVIL CASES," ETC.

Vol. XVIII.

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AMERICAN DECISIONS.
VOL. XVIII.

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

BRUCE v. EDWARDS.

[1 STEWART, 11.]

NOTICE TO SUE PRINCIPAL given by a surety on a promissory note to the holder, and failure to sue until the insolvency of the principal, is a good defense to an action of debt against the surety, though the notice be not in writing.

DEBT by Edwards against Bruce on a promissory note made by the latter and Manley. Plea, notice to Edwards to sue Manley, and neglect of Edwards so to do until Manley became insolvent. Bruce signed the note as surety. Edwards replied that the notice to sue was not in writing. Demurrer and joinder. Demurrer overruled. Bruce then prosecuted this writ of error.

Coalter, for the plaintiff in error.

Martin, contra.

By Court, TAYLOR, J. There is no instance in which the law does not look favorably on the situation of securities, and extend to them every assistance to secure the payment of the debt by the principal. So strict has been the construction in favor of this class of debtors, that any material alteration of the contract, without the express consent of the security, terminates his responsibility. In this case no injury could have resulted to the holder of the instrument by proceeding, upon receiving notice to sue the principal, for he might have sued the security also at the same time. To say that the security should always pay the debt and resort to the principal for his indemnity, would often, without sufficient reason, lay on him

a burden too hard to be borne. The case in 13 Johns. 174 [*Pain v. Packard*, 7 Am. Dec. 369], clearly supports the plea, and tends to confirm the opinion of the court that it is good at common law. As to the statute, its title shows that it was enacted "for the relief of securities;" a construction which would give it the opposite effect surely would not be correct. It is believed, however, that the statute and the principle at common law are distinct in their effects. To make a plea of this nature available at common law it is necessary to aver and prove that the principal has become insolvent after notice given to sue him, and that the means of recovering the debt of him have been lost by the negligence of the plaintiff. By the statute, it is only necessary to aver that notice in writing was given, and that the plaintiff did not use due diligence. The statute is cumulative.

It was insisted in the argument that to authorize such a plea as this, it must appear, on the face of the note, that the defendant was security. But no good reason can be perceived for his not being permitted to aver and prove this fact as any other; such proof does not contradict, or in any way affect, the obligatory force of the instrument.

Let the judgment be reversed and the cause be remanded.

FAILURE TO SUE PRINCIPAL AFTER NOTICE GIVEN: See *Pain v. Packard*, 7 Am. Dec. 369, and note.

BUMPASS v. WEBB.

[1 STEWART, 19.]

WHERE THE DEFENDANT OFFERED AN ANSWER in chancery in evidence, and read a part of it and of the exhibits, consenting that the plaintiff might read the whole, the latter may, at any stage of his argument, refer to, and read any or all of the answer and exhibits.

A PARTNER MAY SUE AT LAW, a copartner, for the excess contributed over and above his proportion of the joint stock.

ASSUMPSIT for money had and received, brought by Webb against Bumpass. Plea, the general issue; verdict and judgment for the plaintiff. On the trial Bumpass offered in evidence Webb's answer and exhibits in a suit in chancery, prosecuted by Bumpass against Webb and another, and read a part thereof, consenting, at the same time, that plaintiff's counsel might read the whole. Plaintiff's counsel did not read any portion of the answer until his closing argument to the jury, when he read the residue of the answer and exhibits. This

reading was objected to by Bumpass, but was permitted. From this answer it appeared that Bumpass and Webb were partners in regard to the transaction, the subject-matter of this action; thereupon defendant's counsel moved the court to instruct the jury that if they believed that the plaintiff and defendant had purchased the land in partnership, then the plaintiff could not in this action recover of the defendant the excess paid by him, above the payment made by the defendant. This instruction was not given. Defendant excepted, and took this writ of error.

Shortridge and Ellis, for the plaintiff.

Coalter, *contra*.

By Court, CRENSHAW, J. The defendant introduced the answer and exhibits as evidence, assenting that the plaintiff might have the entire benefit of them. The whole of them was then before the jury, and either party, at any stage of the argument, had a right to refer to, and to read all or any part of them.

Though a partner cannot maintain an action at law against his copartner, on a transaction concerning the copartnership, he may maintain such action for the excess which he has contributed over and above his proportion of the joint stock.

If the contract was that each party should contribute equally to the purchase of the land, and the plaintiff in the action contributed more than his part, the excess was money paid and advanced to the defendant's use, and recoverable in an action at law.

Let the judgment be affirmed.

GAYLE, J., not sitting.

ACTIONS BETWEEN PARTNERS.—See *Couras v. Prince*, 12 Am. Dec. 649, and note.

WRIGHT v. TURNER.

[1 STEWART, 29.]

ENTIRE CONTRACT.—A contract to serve for three months at an agreed salary per month, is entire, and if the service is left before the expiration of the three months no recovery can be had.

APPEAL. The opinion states the case.

McKinley, Hopkins and Urquhart, for the plaintiff, cited 4 Bos. & P. 351.

Kelly and Hutchinson, *contra*.

By Court, CRENSHAW, J. This was an appeal from a magistrate's judgment. In the circuit court, as appears by the bill of exceptions, Wright, the plaintiff, proved that under a contract to serve the defendant three months, at ten dollars a month, he had served defendant about one month and eight days, and then, against defendant's consent, left his service; that when he left defendant's service he offered to give him a due bill for his wages for the time he served. The circuit court gave judgment for the defendant, and Wright now assigns this as error.

The contract was entire. As the plaintiff left the defendant's service without his consent, he is not entitled to recover even for the time he had served. The offer to give a due bill is to be considered as an offer on the part of the defendant to purchase his peace, and thereby get rid of a dispute with, perhaps, a troublesome man, and not as an *assumpsit* or acknowledgment of any debt.

Let the judgment be affirmed.

IN THE NOTE to *McMillan v. Vanderlip*, 7 Am. Dec. 302, cases upon the entirety of contracts of service are collected.

BROWN v. ADAMS.

[1 STEWART, 51.]

- A PROMISE TO INDEMNIFY ANOTHER** for any loss, if he will act as surety on a third person's bond, is binding. But such promise must be in writing. **SUCH PROMISE NEED NOT BE AVERRED** to be in writing; it is sufficient if the writing be produced on the trial.
- IN DECLARING ON CONTRACTS**, THE RULE is, if the contract would be good at common law, the declaration need not state that it was in writing; but where the duty or liability is created by statute, and also required to be in writing, then the declaration must aver that the contract was in writing.
- A SUFFICIENT CONSIDERATION** is essential to the validity of a contract in writing under the statute of frauds.

ASSUMPSIT containing five counts brought by Brown against Adams. The first count charged that, in consideration that the plaintiff would, at the defendant's request, become surety on a certain sheriff's bond, the defendant promised to save Brown harmless from all liability he might incur by reason thereof; that he did become surety, and was thereby compelled to pay certain sums of money. The second count was substantially the same, alleging that the plaintiff had entered into said bond,

etc., confiding in the honesty of defendant, and that in consideration thereof defendant did undertake to see to the management of the sheriffalty, and save him harmless, etc. The other counts were the common money counts. Demurrer to the first and second counts, and general issue pleaded as to the others. Demurrer sustained; judgment for the defendant.

Bugbee, for the plaintiff in error.

Peck, *contra*.

By Court, CRENSHAW, J. The declaration contains the common money counts, on which issue was taken to the jury, and it does not appear that this issue was ever disposed of, but by an arrangement between the counsel, the second assignment of error was abandoned. The inquiry at present, then, is whether the first and second counts are sufficient. The promise to indemnify the plaintiff against the acts of the sheriff, was clearly the promise to answer for the default or miscarriage of a third person, and by the statute of frauds and perjuries ought to be in writing. But the position contended for against the sufficiency of the declaration is that it contains no averment that the promise was in writing. The distinction recognized by the authorities is, that where the contract would be good at common law, before the passage of the statute, it is not necessary to aver in the declaration that it was in writing; but where the duty or liability is created by statute, and also required to be in writing, then it must be averred in the declaration that the promise was in writing. In the present case the contract, if supported by a sufficient consideration, was good at common law before the enactment of the statute, and though the statute requires such a contract to be in writing, yet by the above rule this fact need not be averred in the declaration, but would be matter of evidence on the trial.

The next question is, that supposing the contract to have been written, is it essential to its validity that it should be supported by a sufficient consideration? The opinion of Chief Baron Skinner, in the case of *Rann v. Hughes*,¹ delivered before the house of lords on a writ of error, and in which he had the concurrence of the twelve judges of England, is high authority for the decision of this question, and whose reasons are so excellent that I think they should be adopted without comment. The principle is there settled that the statute of frauds never intended to make a contract valid, which was not so at common

1. 7 T. R. 350, note.

law; that though the contract be in writing, yet it is *nudum pactum*, and void, unless the declaration shows that it was on a good and sufficient consideration. The same rule of construction has been adopted by the courts of New York, and other American decisions; and in this respect our own statute bears an analogy so strong to the English statute that I am constrained to give it the same construction. Is, then, the consideration set forth in the declaration sufficient to support the contract? In Comyns on Contracts, it is said that if the plaintiff be prejudiced by reason of a promise or undertaking passing from the defendant to him, this is a sufficient consideration to support the promise, and that it is not material whether the defendant is to be benefited or not, if in consequence of his promise the plaintiff was induced to do an act by which he has been damaged, the promise is valid if reduced to writing. The case at bar comes clearly within these principles. The declaration alleges that the defendant promised the plaintiff, if he would become security to the sheriff, he would answer for any damages he might sustain by reason of such securityship, and that confiding in this promise, the plaintiff did become security; by reason of which he hath sustained damage to a certain amount. The court are, therefore, of opinion that the first and second counts of the declaration are sufficient, and that the judgment of the circuit court must be reversed. But because the action is purely in damages, the cause must be remanded for further proceedings in the court below.

DRAUGHAN v. TOMBECKBEE BANK.

[1 STEWART, 66.]

IN RENDERING JUDGMENT NUNC PRO TUNC, the court can not resort to any evidence to show what the judgment should be, other than that furnished by the record.

WRIT of error. The opinion states the case.

Parsons, for the plaintiff.

Hitchcock, contra.

By Court, LIPSCOMB, C. J. In this case, a notice to James H. Draughan, Peter Randon, and Daniel Randon, that the bank would move for judgment against them, and the proper certificate of the president, seem to have been entered on the record of the circuit court for Washington county, at the April term,

1821. There is nothing to show that the notice was served, and the entry of the judgment is in these words: "Same judgment against James H. Draughan and the other defendants, for six hundred and twenty-five dollars, with interest from the twenty-ninth day of December, 1820." In the transcript, the clerk states that this judgment is referred for form to a judgment entered at the same term in a different suit, on behalf of the bank against other defendants, and gives a copy of the judgment in that case, which seems to be formal and sufficient. At April term, 1825, after the return of an *alias sci. fa.* to revive the judgment, and an order thereon for execution, judgment *nunc pro tunc* was entered against James H. Draughan, and Peter and David Randon. That the circuit court had power to enter such judgment if the record showed sufficient data, will not be questioned, but no aid in determining what judgment should have been rendered in this case could properly have been derived from the case to which the clerk referred, which was in a different suit between distinct parties. In rendering the judgment *nunc pro tunc*, the circuit court should not have resorted to any evidence to show what that judgment should be, other than was furnished by the record.

The judgment must be reversed.

HUNTSVILLE BANK v. HILL.

[1 STEWART, 201.]

ON THE BOND OF A BANK CASHIER, conditioned that he shall, with fidelity and to the best of his skill, etc., conduct himself in said office, "safely and securely keeping all moneys deposited in etc., refunding and paying over the same when properly required," the sureties are not liable for loss by robbery.

Plea that the Cashier was Robbed, should set out the place and circumstances of the robbery.

Debt against the sureties on their bond, in the penalty of seventy thousand dollars, conditioned "that, whereas the said William G. Hill hath been appointed to the office of cashier of the said bank, now, if the said William G. Hill shall, with fidelity, punctuality, and attention, to the best of his skill, judgment, and ability, conduct himself in his said office well and truly, discharging all its duties, executing the orders of the directors of said bank, safely and securely keeping all moneys deposited in his hands, refunding and paying over the same when properly re-

quired, rendering, when called on for full and perfect exhibits of the state of the bank, the amount of specie and bills on hand, the amount of depositors and debts due, the amount and denominations of its notes issued and in circulation, keeping his accounts with the bank in a clear and satisfactory manner, in regular series and well-bound books (to be provided by the bank), subject at all times to the inspection of the directors; and performing promptly and faithfully all and singular the duties, acts and things required of him in virtue of his office, the act of incorporation, the rules, regulations, and by-laws, made, or to be made; making no embezzlements of moneys due to or from the said bank; renewing his obligation, and giving such additional securities from time to time as the said president and directors may deem fit to require," etc., "then," etc. The declaration averred that the cashier had refused and failed to pay over the sum of twenty-six thousand four hundred and thirty dollars and thirty-two cents, deposited in his hands, as cashier, and that he had embezzled the same.

Plea, that defendant, Hill, had truly kept and performed all the conditions of the bond, etc., safely, securing and keeping all moneys deposited in his hands, and paying over the same when requested, except the twenty-six thousand four hundred and thirty dollars and thirty-two cents, of which sum Hill was violently robbed while in the discharge of his duties, by persons unknown to the defendants. Same matter averred in answer to the different charges in the declaration. Neither of the pleas averred the circumstances or place of the alleged robbery. Demurrer and joinder to all the pleas.

Demurrer overruled and judgment for defendants.

Hopkins and McKinley, for the plaintiffs in error. The obligation to safely keep and refund the moneys of the bank is unqualified: 10 Johns. 27; 1 Saund. 216, n. 2; Co. Lit. 206; 1 Esp. Dig. 20. The time and place of the alleged robbery are not averred, nor that it was committed without the cashier's consent.

Thornton and Clay, contra.

By Court, GAYLE, J. The merits of this controversy seem to rest on the construction of the condition of the bond. The law of bailment arising on the implied contract of innkeepers and common carriers can throw no light on the extent of the obligation imposed by this contract. The parties here have made the contract for themselves, and must be bound according

to their intention appearing on the face of the instrument, and not according to the principles of a contract implied by law. It is a reasonable and well-established rule of construction that the restrictive words in the first of several covenants, having the same object, shall be extended to all the covenants, although distinct. But an examination of the condition of this bond will render it apparent that what in the arguments have been called absolute and distinct undertakings, following the first general condition of the bond, are nothing more than specifications explaining the duties of the cashier, and stating almost all of them particularly. These specifications of duty, taken collectively, amount to no more than the general condition first stated, "well and truly discharging all its duties," and at the conclusion of the condition we find a repetition of the same matter, showing the intention of the parties throughout, in the words "performing, promptly and faithfully, all and singular, the duties, acts, and things required of him in virtue of his office," etc. To this condition or covenant it can not be denied that the restrictive words at the commencement must apply, and yet this condition is here stated as absolutely and distinctly as the preceding condition for safely and securely keeping all moneys deposited. What did the parties intend by the condition "well and truly performing all its duties?" Certainly the duties which they themselves immediately afterwards specified as appertaining to the office. If the restrictive words be rejected from this enumeration of duties, the leading and most comprehensive covenant would be controlled, and indeed destroyed, by the subsequent less important ones, and we should have to conclude that the parties intended nothing by its insertion.

The form of expression by which these specifications are connected with the first general condition, as by the participles, "executing, keeping, paying," etc., is immaterial, if it appear that these special matters amount to nothing more than what was included in the general condition. But here they are so connected by this form of expression, and the words enumerating particular duties can not, according to any grammatical construction, convey a distinct meaning, unless taken in connection with those which first express the general condition. Leave out those words, and how will the condition of the bond read? "Now if the said William G. Hill shall well and truly, discharging all its duties, executing the orders of the directors

of said bank, safely and securely keeping," etc. To omit **them** would make the whole matter quite unmeaning.

It is evident from the very nature of the language that it **was** not the intention of the parties to apply all the restrictions to each particular duty, but that they are to be applied **respectively** to each, as from its nature it may be susceptible of the qualification mentioned. Thus, if any one undertake that **with** fidelity, and to the best of his skill and ability, he will **keep** and pay over money, ability is applied to the keeping, and fidelity to paying over. This mode in the structure of sentences is used by the best writers, and promotes facility and conciseness in writing and speaking.

On the other branch of the argument, the court have had no difficulty in coming to the conclusion that the pleas are defective in not setting out the place and circumstances of the robbery, so as to show that Hill was acting in the discharge of his duty as cashier when it was committed. The judgment must be reversed, and the cause be remanded, for the purpose of giving the defendants an opportunity of amending their plea.

WHITE, J., not sitting.

GILLESPIE v. DEW.

[1 STEWART, 229.]

ONE HAVING TITLE MAY MAINTAIN TRESPASS, for cutting timber, without actual possession, no one being in the actual possession.

TRESPASS for breaking and entering plaintiff's close, and for cutting and carrying away timber. General issue pleaded. Verdict and judgment for the defendant. It appeared on the trial that the plaintiff was the owner of the land, living twenty miles distant therefrom, and that no one was in the actual possession when the timber was cut. That defendant did enter, and cut and carry away timber was proved. The circuit court charged that, unless the plaintiff was in the actual possession of the land, either by himself or by an agent, they should find for the defendants. The plaintiff excepted and here assigned this matter as error.

Pickens and Collier, for the plaintiff in error, cited 11 Johns. 385, 500; 12 Id. 184; 8 Id. 432; 4 Day, 306; 2 Hayw. 402; 1 Ch. Pl. 133, note; 2 Car. Law R. 39.

R. E. B. Baylor, contra.

By Court, WHITE, J. The charge was in accordance with the English authorities, and with the decisions in some of the states of the Union. But in North Carolina, New York and Connecticut it has been held that, where there is no adverse possession, he who has title, though he has never been in actual possession, may maintain the action of trespass.

The situation of our country requires this modification of the English doctrine. In England, almost all the lands are occupied, but here, the proprietor often lives at a great distance from some of his lands, which are not occupied by tenants, and unless they can maintain this action, they must be denied an important remedy for injuries to their property. Their right to this remedy is sustained by the strong argument of convenience, and by the respectable authorities referred to by the counsel for plaintiff.

We are of opinion that, where there is no adverse possession, the title draws with it constructive possession, so as to sustain the action of trespass. Let the judgment be reversed, and the cause be remanded.

GAYLE, J., not sitting.

McJIMSEY v. TRAVERSE.

[1 STEWART, 244.]

AFTER SUBMISSION OF ALL DEMANDS in controversy, between the parties to arbitrators, and a final award, one of the parties can not be relieved as to a claim which he forgot to lay before the arbitrators.

BILL in equity. The opinion states the case.

Beene, for the plaintiff in error.

Gordon, contra.

By Court, WHITE, J. The bill of McJimsey states that he and the defendant, Traverse, having been partners in trade, and wishing finally to settle the accounts between them, referred the settlement to the award and determination of three arbitrators; that the arbitrators made an award; that the complainant entirely forgot to lay before them a claim for four hundred and forty dollars, which he had paid to one Browning for the use of the firm. The bill prays for a decree for the money so paid, and for general relief.

Traverse, by his answer, admits the partnership, and the submission and the award; that after the award, complainant told him that he had paid this sum of money to Browning, and that he had not laid his claim therefor before the arbitrators. The defendant denies that he acknowledged the claim and all knowledge of it, but from what complainant told him, and resists the application for relief.

It appears that mutual bonds of submission were given; the conditions of which were as comprehensive as words could make them, submitting all matters in difference, and all demands, suits, claims, etc.

It will be unnecessary to notice the testimony taken in the case, as it has no bearing on the point on which our decision will be made.

The circuit court dismissed the bill, and we are now required to examine if there was error in this.

We are of opinion that after a submission of all demands of the parties against each other, and an award thereon, the award is a conclusive bar to an action for any demand subsisting at the time of the submission and award, though the demand for which the action is brought was by mistake omitted to be laid before the arbitrators, and was not considered or decided on by them. The case of *Wheeler v. Van Howlen*, 12 Johns. 311,¹ is a decision of high authority, precisely on this point. Between that case and this we can discover no shade of difference in principle. There the same authorities were relied on as have been relied on here, for the plaintiff in error, and were shown by the court to be widely different in the principles they sustain, from that on which relief was prayed for, in this case and in that. The case referred to is so decisive, that we deem it unnecessary to refer to any other. We believe that none conflicting with it in principle can be found.

It is the unanimous opinion of the court, that the judgment be affirmed.

CRENSHAW, J., not sitting.

1. *Wheeler v. Van Howlen*, 12 Johns. 311.

COMEGYS v. COX.

[1 STEWART, 202.]

SURETIES ON A BOND FOR WRIT OF ERROR ARE DISCHARGED by the principal's agreeing with the adverse party, without their consent, that the judgment may be affirmed, and that he will deliver indorsed bills for the amount, payable in installments, and that no execution shall be levied, except on non-payment of the bills.

WRIT of error. The opinion states the case.

By Court, CRENSHAW, J. Comegys & Pershouse, at September term, 1821, of Madison circuit court, recovered a judgment against Garner. He took a writ of error on the twenty-fifth of January, 1823, and gave the present defendants as his securities in the bond for the writ of error, and the judgment was affirmed at the June term, 1823, of this court. To a *scire facias* on this bond, they pleaded in bar that after they had become securities, and without their knowledge or consent, the plaintiffs and Garner, on the thirtieth of May, 1823, agreed that the judgment should be affirmed by the supreme court; that by the tenth of August ensuing, he should draw and deliver to the agent of the plaintiffs bills indorsed by Cox & Harris, and payable in the years 1825 and 1826, for the amount of the judgment, and that no execution should be levied on Garner's property, nor process issue against Cox & Harris, but in the event of the non-payment of the bills. To this plea the plaintiffs demurred. The circuit court gave judgment for the defendants, and the plaintiffs thereon prosecute this writ of error.

We are of opinion that the plaintiffs, by postponing the levy of execution till the tenth of August, a day beyond the time at which, by the course of proceedings of the court, the execution could have been issued and levied, suspended their remedy against Garner, and thereby destroyed the liability of his securities. During this time of suspension he may have become insolvent, or may have placed his property out of the reach of the law. Any new contract between the principal debtor and the creditor, extending the time of payment or suspending the remedy, without the knowledge and consent of the security, operates as a legal discharge of the security.

It is not necessary, in this case, to decide whether the agreement that the judgment should be affirmed, destroyed the liability of the securities. We are strongly inclined to think that it did not.

It has been suggested that the judgment here ought not

finally to determine the cause, but that it should be remanded to the circuit court. We can see no object in remanding, unless it be to give the plaintiffs an opportunity of replying to the plea in bar. To effect this, they should have asked leave in the court below, when the judgment was given on the demurrer. In neglecting to do so, they have waived the right, and it would be singular if we were to affirm the judgment and remand the cause for this purpose. It is the unanimous opinion of the court that the judgment be affirmed.

LIPSOOMB, C. J., not sitting.

THE STATE v. BECKWITH.

[1 STEWART, 318.]

AN INDICTMENT SHOULD LAY THE DAY when the offense was committed. IF THE DATE BE LAID IN BLANK, so that it does not appear whether the offense was barred by the statute of limitations or not, the judgment will be reversed.

INDICTMENT for an assault, and for an assault with an intent to commit murder. The offense was laid to have been committed "on the — day of —, in the year 1826." Verdict and sentence against the defendant. Motion made in arrest of judgment, on the ground that there was no day laid in the indictment, was overruled, but reserved for the consideration of this court.

Couller, for the defendant. An indictment must be certain: 3 Jacob's Law Dict. 406; more so than civil proceedings: *Id.* 408; 2 Hawk. c. 25; the offense must be laid to have been committed on a day certain: 2 Hawk. c. 25, sec. 82, c. 23, sec. 91; 3 Bac. Abr. 561; 2 Burr's Trial, 446; 2 Hawk. 336, 37, 614; 2 Hayw. 352; McNally, 498, 499.

By Court, SAFFOLD, J. The omission to state with certainty the time of the commission of the offense, is one of the causes assigned for error.

In the language of a man confessedly great: "It is laid down as an undoubted principle in all the books that treat of this matter, that no indictment whatever can be good, without precisely showing a certain year and day of the material facts alleged in it:" 3 Bac. Abr. 561. It is also held by most or all the ancient crown lawyers, that the time of the commission of offenses is, in the general, necessary to be stated in the indictment, and

especially where the time for the prosecution is limited by statute. This is required, in order that it may appear from the indictment, that the offense is within the limits. This reason would apply with full force to the present case. A late statute provides, that for assaults and battery, the indictment shall be preferred, or at least the party recognized within six months of the time committed, else the prosecution shall be barred. If the first count in the indictment would not be affected by this statute, the second certainly would, and the limitation for the first, by a former statute, can not exceed one year. And without here deciding whether a legal bar to one count in an indictment would equally affect the whole, the consideration alone that it does not appear from the record, but that the one count may have been barred, is sufficient to establish the materiality of the time. The indictment was found in October, 1826; it charged the offense within the same year; it may have been exceeding six months anterior to the commencement of the prosecution, and yet within the year. One entire year could not have elapsed, but the doctrine is, that whenever the time is in any way material, it must be averred. The indictment will be vitiated by a repugnancy as to time, as where more than one date is necessary in the description of an offense; and they are stated with such inconsistency that they cannot be reconciled; the same where an impossible date is laid, as the thirtieth of February, or the thirty-first of April, though the intention appear manifest. Though an averment of time is required, it is not necessary that the proof should correspond strictly with it. The offense may be proven to have been committed at any time anterior to the day laid within the limitation of the prosecution. Whether between the time as averred and the finding the indictment, is not now a question: 1 Chit. Cr. L. 184-5.

With respect to the second assignment, which is "that the indictment does not charge the assault to have been committed with intent to murder," little is necessary to be said, as the former is decisive of the case. It is not perceived, however, that this indictment varies materially from correct precedent.

Let the judgment below be reversed.

BRANDON v. HUNTSVILLE BANK.

[1 STEWART, 320.]

ON A DEMURRER TO EVIDENCE, the court, in its discretion, may compel the party to join in demurrer, or to abandon his evidence.

POSSESSION BY THE FINDER OF A LOST ARTICLE is sufficient to entitle him to maintain trover against any one who converts it, except the owner.

POSSESSION OF A SLAVE WHO FINDS A CHATTEL, is the possession of his master.

TROVER for the value of bank notes found by plaintiffs' slave, and taken from the slave and deposited in the bank of the defendants. The notes were notes of the bank; but there was no evidence of right of property in the bank. Other facts appear from the opinion. The plaintiffs introduced evidence in support of his case, to which evidence the defendants demurred. The court required the plaintiffs to join in demurrer, and gave judgment for the defendants. The plaintiffs prosecuted this writ of error.

McClung and Kelly, for the plaintiffs in error.

Hopkins, contra.

SAFFOLD, J. This was an action of trover to recover two thousand one hundred and ninety dollars, in notes, of the Huntsville Bank. The parties proceeded to trial on the general issue. The trial was wrested from the jury by a demurrer to evidence on the part of the defendants, which demurrer the circuit court sustained, the plaintiffs having refused to join in it until required by the court to do so.

It is assigned for error, 1. That the court compelled the plaintiffs to join in the demurrer to evidence; 2. That the court sustained the demurrer, and gave judgment for the defendants.

Evidence was introduced only on the part of the plaintiffs, and which, though of the grade of parol, was not of a circumstantial, but positive nature. Under such circumstances, I am of opinion that according to well-established principles of common law practice, the defendants had a right to demur to the evidence. Had the evidence been of an uncertain or indeterminate nature, leaving the facts to be inferred from circumstances, the propriety of compelling the party to join in demurrer would have been more questionable. But the authority to demur to evidence is founded on the supposition that no injury can result to the adverse party; that the consequence of withdrawing the issue of facts from the jury, and referring the en-

ture case to the court, is an admission by the party demurring of all facts which the evidence offered conduces to prove, or which the jury could be authorized to infer from it: 2 Esp. N. P. 584-5.

But it is contended that the statute which denies to either party the benefit of more than two new trials in any case, should have the effect to vary the common law practice in this respect. The practice of demurring to evidence in proper cases often tends to promote convenience and dispatch in the administration of justice, and to preserve more distinctly the boundaries of right from prejudice, or the influence of extraneous circumstances. For, should we presume the courts are no less liable to prepossessions than juries, yet the decisions of the courts are subject to revision in the appellate jurisdictions, which can not be had on jury determinations. Before so material a right should be abolished, I think we should require express legislation to that effect, and that it can not be done by implication from the statute alluded to. That statute can only have the effect to preclude decisions by the court, in cases of conflicting or doubtful and indeterminate evidence. In such cases, where the chief difficulty rests on the ascertainment of facts, there is great propriety in leaving the determination as the law has done, with the jury, under the instruction of the court as to the law.

On the second point, respecting the decision of the court on the demurrer, the substance of the evidence is found to be that a negro boy, the property of the plaintiffs, found the money, consisting of notes on the Huntsville Bank, to the amount mentioned, showed the same to persons near him at the time, one of whom received the money, carried the same and deposited it in the said bank as money found in the way mentioned, and took from the cashier a list of the amounts and denominations of the notes; that on the next day the same person demanded the money of the cashier, who refused to deliver it to him; that at the time the money was found and placed in the bank, both the plaintiffs were absent from the state; and, further, that after the return of one of the plaintiffs to the state, and before the institution of the suit, he demanded said money of the cashier during banking hours, as having been found by said negro boy, which the cashier refused to deliver to him. These facts were positively stated by several witnesses, without any conflicting testimony; upon which the question arises, whether the owner of a slave who has found money, is entitled by law to sue for and recover the same, in the absence of any

evidence respecting the loser or proper owner, without having reduced it to actual possession, and after it has passed into the possession of another person as lost treasure.

This is believed to be a novel question in the United States, and one involving some intrinsic difficulty; and that the condition of slaves in the United States has no exact parallel in the history of any other country of which we have reports of the judicial decisions. Nor have the researches of the eminent counsel who have been engaged in the investigation of the case, or the subsequent examination of the court, discovered any American adjudication directly in point. We are, therefore, left to decide according to the general analogies of the law and the peculiar policy of this government.

If the principles of the civil law can be regarded as a safe rule for our conduct, they appear quite decisive of this controversy. In Cooper's Justinian, 109, it is said, whatever your slave has at any time acquired, whether by delivery, donation, stipulation, bequest, or any other means, is acquired by you, although you may be ignorant of it, or were adverse to the acquisition; for he who is a slave can have no property. And if a slave be made heir, he can not otherwise take upon himself the inheritance than at the command of his master; but if commanded so to do, the inheritance is as fully acquired by the master, as if he had himself been made heir; and, consequently, a legacy left to a slave is acquired by the master.

It is contended on the part of the defendants, that the condition of slaves in the United States may be assimilated to the feudal villeinage of England; and it is shown from 1 Co. Lit. tit. 2, sec. 177, "that if a villein purchase land, and alien the same to another before the lord enter, then the lord can not enter; for it shall be adjudged his folly that he did not enter when the land was in the hands of the villein. And so it is of goods. If the villein buy goods, and sell or give them to another before the lord seizeth them, then the lord may not seize them."

Hence it is insisted that though the master here may entitle himself to money or goods found by his slave, provided he sieze them while in the hands of the latter, yet if they in any way pass out of the hands of the slave before the master reduce them to actual possession, he can never afterwards assert his claim.

For the plaintiffs it is urged that American slaves may be better assimilated to those of the Greeks and Romans. In

4 De Saus. 267, it is said: "The condition of slaves in this country is analogous to that of the slaves of the ancient Greeks and Romans, and not that of the villiens of feudal times; they are, generally speaking, not considered as persons, but as things; they can be sold or transferred as goods or personal estate; they are held to be *pro nullis, pro mortuis*. Almost all our statute regulations follow the principles of the civil law in relation to slaves, except in a few cases, wherein the manners of modern times, softened by the benign principles of Christianity, could not tolerate the severity of the Roman regulations." In the same case it is decided that slaves cannot take property by descent or purchase; that a legacy to a slave, failing from incapacity to take, sinks into the residuum of the estate, and is subject to the payment of debts. That slaves in the United States are incapable of contracting for, or in any way acquiring property in their own right, is the inevitable consequence of their degraded condition, which denies them the privilege of deposing against white persons, or of suing or being sued, either in law or equity. In the South Carolina decision alluded to, no opinion is intimated respecting title to property which, by the proprietor, may be abandoned to a slave, or found by him, and to which there is no other claim except that of the master and the one who may have first received it from the slave.

With other distinctions which exist between slavery in the United States and that of the Romans, it is shown that with respect to the latter, the slave could own in his own right his *peculium*, and was responsible for his torts to the value thereof, or the injured party could seek his redress against the master and recover the damages sustained, or have the slave delivered up as an indemnity, as far as his value would go. To the extent of the slave's *peculium*, which is understood to be his individual savings from his daily earnings, he was permitted to trade and acquire property in his own right. Therefore, having some capacity to trade, it followed as a consequence that anything which he acquired and disposed of before the master reduced it to his possession, was placed beyond his reach. In this country it is so far different, that to create responsibility on the master, the slave must at the time be in his immediate employment, or from his vicious habits and general liberty, some degree of culpability must attach to the master to make him responsible. With respect to commerce, our slaves can do nothing in their own right; can hold no property, can neither

buy, sell, barter, nor dispose of anything without express permission from the master or overseer, so that everything they can possess or do is in legal contemplation on the authority of the master. But does it result that everything they are found in possession of is to be regarded as unappropriated and abandoned to the first occupant, unless it is necessarily so? Policy would seem to forbid it. None ever denied but that slaves are rational, intellectual beings; they have capacity to know that value attaches to property, and how to take care of it. Many things are necessary to their own comfort and support, which the owner is bound to furnish, and the owner is absolutely entitled to all their earnings. If, in order to avoid contention and strife respecting treasure found by or abandoned to a slave, it is the policy of the law to designate some proprietor, there would appear to be great propriety in making the owner that person. It is also necessary on the principles of humanity to slaves that they should be protected from the depredations and violence of persons who might discover them in the possession of articles which the master had not actually seized; and there can be no distinction in principle whether the article be of great or little value, or whether lost, abandoned, or given by the proprietor.

An argument from the defendant's counsel which appeared to give some plausibility to the defense was, that to authorize a recovery in trover, the plaintiffs must have a general property in the article, or have had actual possession of the special property; and that if in cases like the present, it is held that the possession of the slave was the possession of the master, the rule would subject owners to dangerous responsibility for abuse or misuse of property of which they had no knowledge or control. I admit, if this would be a consequence of the doctrine, it would be fatal to it; but I think it can not be considered that masters are in all cases responsible for the torts and crimes of their slaves committed on special property while in their possession. In such case, if the master has bestowed all the care and diligence on the bailed property that the law exacts of a bailee; and if his slave, or any other person, in relation to which he is in no way censurable, commit a depredation on it, he is not responsible. If one as bailee has placed the property in a situation promising every reasonable security, and his slave, or any other, by art or violence, which could not have been anticipated or resisted, take or destroy it, the bailee is not responsible. With respect to special property, the liability of the

possessor depends much on the nature and terms of the contract, whether express or implied; and as respects lost goods, if little or no security is offered the loser, while they remain with a slave as the finder, it must be viewed as his own fault or misfortune that the property is not in responsible hands, and as respects the owner of the goods, his security is no respect weakened by the rule that the master shall be preferred to all other claimants except himself.

But I think found property is to be viewed in a light something different from absolute general property, or special property in the usual acceptance of the term. I am of opinion that the finder, and if a slave, the master, is the apparent general owner of the property under an uncertain or contingent title; one that may be defeated by the discovery of the owner or loser, if he has not abandoned the same; and that this is the true and safe rule, warranted by the analogies of our law, and directed by the same necessity that confers title by occupancy to property to which there is no owner. Special property, in the general acceptance, and as referred to in the cases cited, presupposes an absolute title in some person known to the possessor, or who will doubtless be known. With respect to found treasure, when the loser is unknown, it is doubtful whether the finder's title can ever be defeated. He cannot honestly conceal the finding; but he is the ostensible and legal owner of the articles, and may publicly retain them, except as to such things as the statutes have otherwise provided for, until the loser is discovered, which may never happen.

My opinion is, that the judgment below must be reversed, and that judgment be here rendered in favor of the plaintiffs for the amount of bank notes sued for, with interest thereon from the date of demand, which was the issuance of the writ, and in this a majority concur.

By CRENSHAW, J. Two positions have been taken in the argument of the case, one of which seems preliminary to the main question, and which was, whether the court could compel a party to join in a demurrer to evidence. The rule, as I am able to collect from the law, appears to be that the court may compel a party to join in a demurrer to evidence, or to abandon his evidence; and that this is a matter altogether within the discretion of the court.

The main question now is, whether the evidence authorized the judgment of the court. The facts arising from the evidence appear to be, that the plaintiff's slave found the bank bills in

question; that they were taken to the bank by another person, who received them from the slave, and delivered them to the officers of the bank. As applicable to this case, I hold the law to be, that the finder of a chattel acquires at least a special property in the same, and his right is good against all the world, except the lawful owner; that the possession which he acquires by finding, is sufficient to enable him to maintain the action of trover against any person who may convert the property, except the true owner, and that possession itself is presumptive evidence of right.

I further maintain that, in this country, a slave is in absolute bondage; that he has no civil right, and can hold no property except at the will and pleasure of his master; that his master is his guardian and protector, and that all his rights, acquisitions and services are in the hands of his master; that a slave is not a beast, but is a rational, human being, endowed with volition and understanding like the rest of mankind, and that whatever he lawfully acquires and gains possession of, by finding or otherwise, is the acquirement and possession of his master. That the negro gave up voluntarily to Pryor and Brown the bank bills which he had found, could not deprive the master of his right to them, which had previously vested by the finding of the slave; nor can the circumstance of Brown and Pryor depositing them in the bank alter the nature of the case; because the evidence does not warrant the inference that they were credited with the amount, or that the officer of the bank, who received them, was ignorant who had found the money. The rule is to infer strongly against the party who demurs, but to infer nothing against his adversary, unless the inference be irresistible; because by his act he has drawn the subject from the jury, who are the proper triers of facts, and referred it to the court, who is the peculiar organ of the law.

But in argument it was objected that the action was given to the first finder of a chattel, because he is ultimately liable to the rightful owner for its value, whenever he might appear to claim it; and that if it were taken from the slave before it came to the knowledge or possession of the master, in that event he can not be liable to the rightful owner; and for this reason the master shall not have the action to recover the value of the chattel. In answer to this objection, it is contended that the finder's liability to the rightful owner for the value of the chattel is one reason why the law gives him the action; but another, and perhaps a better reason, is because the finder, by the mere

act of finding and taking possession, acquires a right of property against all the world, except the lawful owner, or one who shows a better right. In disposing of the case before us it is not necessary to meet this objection; if the law give the plaintiffs a right to the present action, it can not be material to inquire after consequences which may possibly arise. When the question of the plaintiff's liability to the rightful owner arises, we will endeavor to meet and decide it on principles of law. Argument drawn from villeinage under the feudal system, and slavery in ancient Rome, have been resorted to, in order to prove by analogy that the possession of a slave who finds a chattel is not the possession of, and vests no right in, the master, unless he seize it while in the possession of the slave. The feudal system was peculiar to itself, but under all its rigor the villein or vassal had some civil rights; but whether he had civil rights or not, the rules of that system, as law, can have no application in relation to the condition of slavery among us, nor can the condition of slavery in ancient Rome, however abject, aid us in illustrating the case before us.

The defendants can be viewed in no other light than *tortfeasors* or trespassers, who have got possession of what is not their own; for there is not a particle of testimony tending to establish a right of property in the bank, either qualified or general.

I am of opinion that the judgment should be reversed, and the proper judgment rendered by this court for the nominal amount of the bank notes, by way of damages. I say reversed and rendered because the bank bills are presumed to be worth their nominal amount, in the absence of testimony to the contrary.

Judgment reversed and rendered.

TAYLOR and WHITE, JJ., not sitting.

TROVER BY FINDER OF LOST ARTICLES.—It was decided in the leading case of *Armory v. Delamirie*, 1 Str. 504; S. C., 1 Smith's Lead. Cas. 636 (7 Am. ed.), that the finder of a lost chattel, though he does not by such finding acquire an absolute property or ownership, has such a property as will enable him to keep it against all but the rightful owner, and consequently that he may maintain trover against a wrong-doer. This right of the finder is recognized in *McLaughlin v. Waite*, 9 Cow. 670; S. C. affirmed, 5 Wend. 404; *Pinkham v. Gear*, 3 N. H. 484; *Poole v. Symonds*, 1 Id. 289; *Magee v. Scott*, 9 Cush. 148; *Clark v. Maloney*, 3 Harrington, 68; *Bridges v. Hawkesworth*, 15 Jurist, 1027; 7 Eng. L. & E. 424; *Hostler's admr. v. Skull*, 1 Am. Dec. 586, in note. This proposition may be considered definitely settled. But circumstances attending the finding, or the nature of the alleged

conversion, may arise, which may render the subject under consideration somewhat perplexed. One of these conditions is suggested by the principal case, and is embodied, as a limitation of the doctrine therein announced, by Mr. Stewart, in his syllabus to the original report of the case, as follows: "The finder of lost treasure, *before the loser is known*, has a sufficient special property in it to maintain trover against any one who converts it, except the true owner." This understanding of the decision can be deduced only from the opinion of Judge Saffold, as Judge Crenshaw, although concurring in the right of the finder to maintain trover, as stated in *Armory v. Delamirie*, *supra*, does not advert to the qualification apparently made by the language of his associate. That language is as follows: "I am of opinion that the finder * * * is the apparent general owner of the property under an uncertain or contingent title; one that may be defeated by the discovery of the owner or loser, if he has not abandoned the same; and that this is the true and safe rule, warranted by the analogies of our law, and directed by the same necessity that confers title by occupancy to property to which there is no owner. Special property in the general acceptance, and as referred to in the cases cited, presupposes an absolute title in some person known to the possessor, or who will doubtless be known. With respect to found treasure, when the loser is unknown, it is doubtful whether the finder's title can ever be defeated. He cannot honestly conceal the finding, but he is the ostensible and legal owner of the articles, and may publicly retain them, except as to such things as the statutes have otherwise provided for, until the loser is discovered, which may never happen."

This language, and its interpretation by Mr. Stewart, seem to indicate that the right of the finder to maintain trover for the conversion of the property is defeated by the discovery of the loser. This is certainly an important limitation of the rule of *Armory v. Delamirie*, and if it is the law, will enable one who has wrongfully taken the property from the finder to set up the rights of a third person with whom such wrong-doer is not in privity. But it is conceived that the discovery by the finder or by one who has taken the property from him, of the loser, does not, ordinarily, affect the finder's right to maintain trover.

Finders of lost property are bailees; and though not obliged to assume the custody of the articles, if they do so voluntarily, must exert at least slight diligence in the keeping of them: Story on Bailments, sec. 87; Schouler's Bailments, 33. Should the finder see fit to resort to law for the recovery of the value of the articles from one who had converted them, the loser being known, although such conduct would be more than slight diligence, yet a tort-feasor could not deny the finder's right to use that diligence. Nor as between the finder and the defendant could the latter say that he had become a bailee for the loser by reason of the conversion, and set up the property in the loser against the finder. The cases permitting a defendant in trover to defeat the action by showing a title or right in a third party, are limited to those where the defendant has at first come into the rightful possession of the chattels, as in the case of a seizure by a sheriff, or where goods have been placed in the hands of a bailee: *Hontler v. Skull*, 1 Am. Dec. 589, in note; and then only where such third person has made a demand upon the defendant for the goods: *Sheridan v. New Quay Co.*, 4 C. B. (N. S.) 618; or, as one authority maintains, where they have been actually delivered to, or a recovery has been had by, the true owner: Story on Bailments, sec. 266, 8th ed. It was expressly ruled in *Harker v. Dement*, 9 Gill, 7, 12, that the defendant in trover "could not be permitted to prove that the title to the property in dispute

was not in the plaintiff, but was, at the time of the conversion, outstanding in a third party, with whom he had no connection or privity, to defeat the action, or in mitigation of damages." So, also, *Duncan v. Spear*, 11 Wend. 54.

The doctrine suggested by Mr. Justice Saffold, would promote and countenance a general scrambling to wrest from the finder, the property that had rightfully come into his possession. But this doctrine is not the law. The finder has a special property in the treasure not to be divested by the mere fact of knowing who the loser may be. Such knowledge may affect the duties of the finder toward the loser, but it can not alter the rights of the finder with respect to third persons. The nature of the special property of the finder in the articles is well illustrated by the following decision of *Clark v. Maloney*, 3 Harrington, 68. The plaintiff, in an action of trover, had found certain logs, the subject-matter of the action, floating in a certain bay, and had picked them up and moored them. Some time after, the logs were discovered in the possession of the defendant, who found them adrift. The defendant urged that his right of property in the thing lost was as great as that of the first finder, and that he was not responsible to any one but the rightful owner.

Chief Justice Bayard states the proposition that possession is *prima facie* evidence of property, and that in the absence of better title "is as effective a support of title as the most conclusive evidence could be," and then continues: "It is for this reason, that the finder of a chattel, though he does not acquire an absolute property in it, yet has such a property as will enable him to keep it against all but the rightful owner. The defense consists not in showing that the defendants are the rightful owners, or claim under the rightful owner, but that the logs were found by them adrift in Mispillion creek, having been loosened from their fastening either by accident or design; and they insist that their title is as good as that of the plaintiff. But it is a well-settled rule of law that the loss of a chattel does not change the right of property: and for the same reason that the original loss of these logs by the rightful owner did not change his absolute property in them, but he might have maintained trover against the plaintiff upon refusal to deliver them, so the subsequent loss did not divest the special property of the plaintiff. It follows, therefore, that as the plaintiff has shown a special property in these logs, which he never abandoned, and which enabled him to keep them against all the world but the rightful owner, he is entitled to a verdict."

CHOSSES IN ACTION appear to be governed by a different rule. Daniel, in 2 Neg. Inst., sec. 1468, says that "the finder of a bill or note acquires no title to a lost bill or note, and the owner, upon identifying it and tracing it to his possession, may maintain trover against him." The reason of the distinction in the case of choses in action was stated at length by Chief Justice Savage, in *McLaughlin v. Waite*, 9 Cowen, 670, and was affirmed on appeal, in 5 Wend. 404. The facts are enumerated by the chief justice in the opinion of the court. The action was assumpsit for money had and received. "The defendants were lottery-office keepers. They purchased a certain ticket and sold it in shares. One half was found by the plaintiff in the street, who carried it to the defendants, and said he expected a reward for finding it. It was advertised, but no owner appeared. The plaintiff then claimed to be owner by virtue of the finding; and the ticket having drawn five thousand dollars, demanded payment of one half, which was refused. The judge charged the jury that the plaintiff was not entitled to recover, he having obtained possession by finding. The jury found a verdict for the defendants; and by a stipulation between the parties, the supreme court, if they are of

opinion, from the facts, that the plaintiff is entitled to recover, are to direct judgment for the plaintiff for two thousand one hundred and twenty-five dollars, with interest from the fifteenth December, 1823, and either party is at liberty to turn the case into a bill of exceptions or special verdict.

"That the finder of a chattel, though he does not acquire by such finding an absolute property or ownership, yet has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover, are propositions fully established by the case of *Armory v. Delamirie*, 1 Str. 505. [His honor here quoted the facts and the doctrine of that case.] The same doctrine has often been recognized: 3 Salk. 365; 1 Taunt. 309. It is not controverted, but expressly admitted, by the defendant's counsel. It is denied, however, that that doctrine is applicable in this case. The plaintiff here found, not a chattel, but a chose in action; and it is contended that the law relative to choses in action is to be the law of this case. The ticket is supposed to resemble a promissory note payable to bearer; and it is settled that the bearer of such a note which is lost must show a valuable consideration: *Hinton's case*, 2 Show. 235; *Grant v. Vaughan*, 3 Burr. 1523. And the bearer having come to the possession of such a lost note, or a lost bank note, in the due course of business, may maintain trover against any person who withholds it, even against the owner who lost it; though the finder could not, but would be answerable to the loser: *Miller v. Race*, 1 Burr. 452. In this court, the rule is that 'the bearer of a note or bill payable to bearer need not prove a consideration unless he possesses it under suspicious circumstances:' 7 Cow. 176. Any person in possession of a note indorsed in blank, or payable to bearer, may sue upon it, and *prima facie* he is the owner; but if it appear to the court that he is not the true owner, then he must show that he gave value for it, or received it in the ordinary course of business.

"In the case of *Ford v. Hopkins*, 1 Salk. 283, Lord Holt is made to say that bank notes, exchequer notes, or lottery tickets are similar; and the right to bring trover for them by the owner against any person into whose hands they may come is governed by the same rules. Lord Mansfield supposes this to be a mistake of what was said by Lord Holt, as bank notes are similar to cash, and whoever receives them fairly for a valuable consideration is entitled to retain them. If this doctrine proves anything in the principal case, it shows that the loser of the ticket may maintain an action against the plaintiff, or any person to whom he might pass it; though no such action could be sustained against the person taking a negotiable note, payable to bearer, if taken in the fair course of trade. In that particular, then, there is a difference between a note payable to bearer and a lottery ticket.

"It is for the convenience of trade that notes payable to bearer pass by delivery, and that actions may be brought upon them by the *bona fide* bearer. But if the holder of such a note, or even a bank note under suspicious circumstances, can not recover without showing a consideration, it follows that a finder can not maintain such action. And if the finder of a bank bill, or note payable to bearer, can not, as such, recover upon it, because he has no title to it, upon what principle of law or public policy shall the finder of a lottery ticket stand in a better situation?

"It is said that the owner's remedy is gone as against the defendants, but would be perfect against the plaintiff. The equities of the parties to a gaming contract, though sanctioned by law, are not entitled to much consideration. But if they were, it is indifferent to the court and to equity whether the plaintiff or the defendants have the money. The plaintiff has paid

nothing for it, nor have the defendants; for though they paid for the ticket, yet they were reimbursed by the sale of the shares of the same ticket. It is therefore a question of strict right between the parties. The ticket is payable to the holder. 'This ticket will entitle the holder to one half share of such prize as shall be drawn to its number,' etc. Now, although bank notes and lottery tickets are not alike, yet there may be some analogy; for instance, in ascertaining who is properly called the holder. There can be no doubt that a payment of this ticket to the plaintiff, had he not disclosed the fact of finding, would have been a defense to any action which the owner might bring against the defendants; but if they had paid it to the plaintiff, with full knowledge that he found it, and, of course, was not the true owner, would they not be compelled to pay again to the true owner, if he had demanded it in season? Under such circumstances, the maker of a note would be compelled to pay a second time, and I can not see the difference in principle. In case of the note, the instrument is negotiable, and passes by delivery; more than that can not truly be said of a lottery ticket. In case of the note, the maker would be compelled to pay the owner, because he had paid with notice, one who was not the owner. The same reason would apply in the case of the ticket. If the possession, by finding, of a note payable to bearer does not, *per se*, make the possessor the bearer in law, can a similar possession of the share in question, *per se*, constitute the possessor, without consideration, the holder within the legal construction of the contract?

"The case of the jewel found by the boy is not in point. There the plaintiff had actual possession of the chattel, the property itself. Here the plaintiff has had no such possession. He had possession of a contract to which confessedly he is not, and never was, a party, unless the bare fact of finding makes him such party. It seems to me, in the absence of express authority, that all legal analogies are against the doctrine. Here is a sum of money in the hands of the defendants, to which neither party is equitably or legally entitled. The maxim *melior est conditio possidentis* seems to be applicable. The motion for a new trial must be denied."

THE PLACE IN WHICH AN ARTICLE IS FOUND does not alter the finder's right to maintain trover against any one but the rightful owner: *Bridges v. Hawlesworth*, 15 Jurist, 1027; 7 Eng. L. & E. 424. The facts here were that the plaintiff found a package containing notes, in the defendants' store, and delivered them to the latter, instructing them to advertise for the owner. The owner not being found, the plaintiff tendered to the defendants the expenses of advertising, and demanded the return of the property. The demand not being complied with, trover was brought, and judgment given for the plaintiff. This principle is recognized also in *Tatum v. Sharpless*, 6 Phila. 18, an action prosecuted by a conductor of a railroad train for the recovery of certain United States treasury notes found on one of the seats of a car by the conductor, and delivered by him to the defendant, the receiver of the railway company.

THE SUBJECT OF TROVER is considered in the note to *Hostler v. Skull*, 1 Am. Dec. 587.

POPE v. NANCE.

[1 STEWART, 361.]

GIVING FORGED NOTE IN PAYMENT, by a partner to a creditor of the firm, after its dissolution, does not extinguish the original liability of the partnership.

RETURN OF A NOTE on which the name of one of the makers was forged, is not essential before action on the original demand can be brought, if it appear that the other parties are insolvent and no injury will result to the person transferring the note by failing to return it.

ONE WHOSE NAME IS FORGED to a note is a competent witness in an action by the transferee of the note against the transferor on the original liability.

THE RECORD, VERDICT AND JUDGMENT on a plea of *non est factum* in an action by the transferee against the apparent maker of the forged note, are evidence in an action by the transferee against a partnership on the original liability, the consideration of the transfer, the partner passing the note having knowledge of the action and being consulted in its management.

WRIT of error. Nance and Co. brought an action of assumption against Pope and Hickman. Plea, the general issue. It appeared that Pope and Hickman, partners, had purchased slaves of Nance and Co., through the latter's agent, and had given their note in part payment therefor. Two months after the date of the note, which was payable in nine months, Pope and Hickman dissolved partnership, in April, 1819, Pope settling the affairs of the firm, paying all debts. In December, 1819, Nance and Co. pressing Pope for the payment of the firm note, the latter gave the note of two other parties, one of whom was Turner, indorsed by a third, which Nance and Co. agreed to receive in payment of the Pope and Hickman note, which was delivered up and canceled. Nance and Co. took this note relying especially on the signature of Turner, and so stating to Pope. All the parties to the note were represented by the latter to be men of means. About the maturity of the substituted note it came to Nance and Co.'s knowledge that Turner declared the signature purporting to be his, a forgery. An action was commenced on this note, and judgment obtained against all the parties except Turner, who, on the plea of *non est factum*, proved the signature to be a forgery. The other parties proved to be irresponsible and the judgment against them remained unsatisfied. Of this action, Pope had full knowledge, an attorney generally employed by him having conducted the suit, and Pope being consulted in regard to the persons to be subpoenaed, to prove the signature. The record of that proceeding was offered in

this action as evidence of the forgery. The defendants objected to its admissibility. Harris, the indorser, was also offered to prove that his name had also been forged.

This action was prosecuted by Nance & Co. to the use of Lucas, one of the firm to whom the forged note had been given. Lucas had knowledge of the dissolution of the firm when he received the note and delivered up Pope and Hickman's note to Pope.

The jury were instructed as follows:

1. That if Hickman was shown not to be liable, no recovery could be had, as this was a joint action. But that the payment in a note of a third person after the dissolution, did not necessarily prevent a resort to the original liability; though the partner could not make a new positive contract to bind the late firm, yet, and more especially if authorized to close the unsettled business and pay debts, if he transferred in payment a forged note as a genuine one, it did not effect the object which it purported to do, and the old liability remained unsatisfied; that if there was no fraud and the note was genuine, it was a good payment, but if there was a fraud in the transaction, it was no payment by reason of the fraud; that a willful concealment or false representation by Pope, as to the solvency, would constitute such fraud, but if he disclaimed any responsibility as to solvency, and referred to others for information, and such information was had and relied on, it could be no fraud.

2. That it was a general rule, that a party who had received the forged note of a third person in payment of a precedent debt, was bound, as soon as the forgery was discovered, to return or offer to return the note, in order to secure his remedy on the original cause of action; that the precise degree of diligence necessary in such cases, was difficult to delineate and not well defined by the books. On the one hand, all that commercial diligence required of the holder of a bill of exchange to fix the drawer or indorser, was not necessary, neither would it do to lay down the rule with too much looseness the other way. The object of the law is manifestly to secure the rights and remedies of the person who may have in good faith transferred such a note to another, and therefore, although the above is the general rule, yet it is no more, and exceptions to it do exist. If, then, the jury are satisfied from the whole evidence that Pope and Hickman have really sustained no injury from a failure on the part of Lucas to return the substituted note, the plaintiffs

can resort to the precedent debt, notwithstanding said note was not returned.

3. That the record and verdict in the case against Turner were not conclusive evidence of the forgery of Turner's name, but it was evidence to be weighed with other evidence on the same point.

4. That as to the indorsement of Harris, if it was proven not to be in his handwriting, it was *prima facie* evidence of its forgery, until the presumption was destroyed by showing that it was written by some one duly authorized.

The court refused to give certain instructions asked for by the defendants, and this, together with the admission of evidence objected to, and the instructions given, were assigned as errors.

Hopkins, for the plaintiff in error.

Kelly, Hutchinson, Clay and McClung, contra.

GAYLE, J. (after stating the facts.) The first point insisted on is that the failure of Lucas to offer to return the note received in payment to Pope within a reasonable time after Turner alleged it was a forgery as to him, discharged the plaintiffs in error from their liability, and that he ought to have offered to return it before he sued Turner. On this point, the second charge of the court below was given, as stated in the bill of exceptions.

The plaintiff's counsel requested the court, in addition to that charge, to instruct the jury that if the note was received in payment, and was not offered to be returned in a reasonable time after it was heard that Turner said the signature as to him was a forgery, the plaintiffs could not recover; and also that they could not recover if no offer was made to return it before suit was commenced against Turner. It is obvious that this last proposition was too broad, and ought not to have been acceded to by the court. It cannot be perceived how the bringing of a suit against Turner could affect the interest of Pope and Hickman. If the offer to return in a reasonable time had been made, it was immaterial to them what measures had been commenced against the makers, for they could not have interfered with, or had any influence upon the steps they might think proper to adopt for their own security. The suit might have been commenced, and the note have been returned on the same day.

The principle assumed, then, in the other part of the request

of the plaintiffs' counsel to charge the jury, is that the return, or offer to return, in a reasonable time, must be made without the exception laid down by the court, to wit, that if the plaintiffs in error have received no injury from a failure to return, they cannot make such failure the ground of objection. In the case of *Clark v. Young & Co.*, 1 Cranch, 181, it was held that suit might be brought against the person of whom the note of a third person was received before the return of the note, and the principle is recognized that there was no necessity to return it on account of the insolvency of the maker. The case was this: Clark purchased of Young & Co. a quantity of salt, and at the time of delivery indorsed to them a note on one Mark Edgar. Young & Co. instituted a suit against Clark, as the indorser, and a verdict was found for the defendant, whereupon they sued on the original contract and recovered. The note was not returned before the bringing of the second suit. Edgar was reported insolvent, and although Clark was entitled to the benefit of the note, the court said there was no necessity for an offer to return it, even before the commencement of the last suit. In this case it is apparent that the reason why a return was not necessary was, because, on account of the insolvency of the maker, there could be no injury to the indorser. The case of *Johnson v. Weed*, 9 Johns. 310 [6 Am. Dec. 279], was where a note was given in payment of goods. It was doubtful whether it was received as a payment. Before it became due, the maker proved insolvent, and the plaintiff recovered on the sale of the goods. No offer to return the note appears to have been made. In *Puckford v. Maxwell*, 6 T. R. 52, a draft was given in payment of a precedent debt, and being dishonored, was treated as a nullity. If the drawer had had funds in the hands of the drawee, notice would have been necessary; but having none, he could receive no injury for want of it.

In these cases, the principle is established that the return of a note is unnecessary, whether it be received in payment or not, if the failure to return could be of no injury to the person by whom it was put off. There is no difference in the reason of the thing between the note of a third person and a bill of exchange or draft. In the latter case, the notice of dishonor is necessary to enable the drawer to protect his own interest, but where his interest can not be affected for want of notice, it is not necessary. This principle was expressly laid down by this court in the case between these parties at the last July term. The chief justice then says in substance that the offer to return

was unnecessary if it would visit no injury to the party. On this point the plaintiffs' counsel has relied upon an expression of Mr. Justice Story, in the case of the *United States Bank v. Bank of Georgia*¹. He there states that "any neglect will absolve the payor from responsibility." It is apparent that the exception stated by the court was not in his contemplation; if it had been, there is no doubt he would have added it.

But there is another view of the subject which must be conclusive. Admitting that the principle contended for by the plaintiff's counsel is correct, it could not control this question. The evidence shows that Pope, from the earliest suggestion of doubt as to Turner's signature, resolved not to pay the debt in any event. He showed some anxiety to have the suit against the makers well conducted, but disclaimed all liability or intention of being bound by the original contract. This was known to the agent of Lucas, for he was present at the time. Of what avail, then, would have been an offer to return? The law does not require an act to be done which would be useless in itself, which doubtless would have been the case here.

In addition to this it may be remarked that, under the circumstances, Lucas may not have conceived himself authorized to return the note; for the better opinion seemed to be, when suit was commenced, that the signature of Turner was genuine. It was the impression of those who examined it, that it was no forgery, and of Pope among the rest. He did not admit the fact of forgery, but on the contrary denied it; and, until it was established in some legal way, Lucas could have no ground for a recovery on the original consideration. Pope, therefore, having notice of the suit and of the matter to be tried, and not consenting to, but denying the forgery, cannot complain of a failure to return the note. It was the best mode of ascertaining the forgery, and was of itself a good excuse for Lucas' not returning the note. The suit was in fact as much for the benefit of Pope as of Lucas.

The second point raised in the argument by the plaintiff's counsel is, that the act of Lucas in receiving the note in payment, after he knew of the dissolution of the partnership, extinguished the partnership debt of Pope and Hickman, and it could never afterwards be revived without the express consent of Hickman.

There can be no doubt that if the note had been what it purported to be, Hickman would have been entirely discharged.

The true question here is, whether it was such a contract as threw the burden of its liabilities expressly on Pope, so as to protect Hickman from any recourse on him. The cases which have been referred to by the plaintiff's counsel are, most of them, belonging to that class which release the partner from his partnership debts when the individual note of another partner has been received in payment. This is acknowledged to be correct as to partners generally, and will apply with greater force to a retired partner. This rule is clearly and positively laid down by Lord Kenyon, in the case of *Evans v. Drummond*.¹ He says, emphatically, that it is not "to be endured, that when partners have given their acceptance, and when, perhaps, one of the two partners has made provision for the bill, that the holder shall take the sole bill of the other partner, and yet hold both liable." But the question here is, whether by the contract Lucas relinquished his claim against the partnership.

In the case of *Jones v. Ryde*, it was held "that a person who discounts a forged navy bill for another, who passed it to him without knowledge of the forgery, may recover back the money, as had and received to his use, upon failure of the consideration." Heath, J., said: "If a person gives a forged bank note there is nothing for the money; it is no payment." In the same case it was said: "A man takes this security, looking to the persons who are to pay it; he takes it on the presumption that it is a navy bill. It was not what it purported to be."

The case of *Markle v. Hatfield*, 2 Johns. 455 [3 Am. Dec. 446], is more in point, and in principle more nearly assimilated to this case than any which has been read from the bar. Chief Justice Kent reviewed, with the clearness and discrimination for which he has been so justly distinguished, the doctrine as it is now settled, in the cases of payment in negotiable paper. He shows that in transactions of this kind there is no difference between a bank note and the note of a third person. The forgery of either is the same thing to the party receiving it. He is equally unsuspecting and ignorant as to its genuineness, and having received a private note instead of a bank note, and as a substitute for it, there is no reason that he should be held to risk its forgery. In the language of the judge just alluded to, the plaintiffs below parted with their just demands on the defendants without receiving what was intended. The note was not what it purported to be, and was, in fact, no payment. The contract between the parties was, that the note should be paid by the note of Hutchings

1. 4 Esp. 89.

& Co. and Simon Turner, indorsed by Harris. Was any such payment made? How can Lucas be bound by a contract which was not executed on the other side? And how can they claim the benefit of it in the very face of a failure, on their part, of a compliance? The situation of Hickman being a retired partner can make no difference. He has never been discharged from his liability as one of the firm. The analogy traced by the plaintiffs' counsel between this case and those of deeds with warranty of title to the property, is not perceived. The deed is genuine; the obligations it imposes on the parties to it are not illusory, and the purchaser relies on those obligations. The deed is what it purports to be, and it is held as an indemnity against the want of title. If the deed be forged, then the resemblance appears, or if Pope had given his own note in payment, the cases put by counsel would be more analogous.

The third position assumed by plaintiffs' counsel is, that the testimony of Turner on the trial ought not to have been admitted, because he was directly interested in establishing the forgery of the note. This point and the next, to wit, that the record of the trial between Lucas and Turner was inadmissible, will be considered together.

We think the principle involved in this part of the case, too well settled to be now questioned. Pope was duly notified of the pendency of the suit, was applied to for instructions as to the witnesses to be subpoenaed, and was interested in the issue to be tried. It was upon the successful termination of that suit that his liability to Lucas was to be at an end. The case of *Kip v. Brigham et al.* is similar to this. The sheriff was sued for an escape, and a recovery had; he gave notice to the securities of the debtor for the jail bounds. In a suit against said securities, the record was held admissible and conclusive. Turner, therefore, having no interest in the suit, was a competent witness, and the temptation he may have had to swear falsely, could only go to his credit.

The admissibility of evidence to prove the forgery of the name of Harris, the indorser, was objected to in the argument, though not noticed in the brief. It was said that by our statute he can not be discharged from his indorsement, unless he denies it on oath. The statute in this respect has placed promissory notes, etc., on the footing of sealed instruments, and forgeries of every kind are permitted to be proved in this way.

In the examination of this case, the court have not thought it necessary to advert to all the arguments made by the counsel, by

way of illustration, but have confined themselves exclusively to the points which they believe should govern the case. They have been relieved from much labor of investigation by the very able argument of the counsel of both sides.

CRENSHAW, J. In this case I have not been able to come to any satisfactory and conclusive opinion, and, therefore, do not undertake to dissent from the judgment of the court. I am, however, inclined to think that unless fraud has been brought home to Pope, he and Hickman can not be charged, if the note was not returned as soon as it was discovered that it was of no value. But in expressing no dissenting opinion, it is not to be understood that I concur in the judgment of the court.

Judgment affirmed.

WHITE, J., having presided below, did not sit.

POWER OF PARTNERS AFTER DISSOLUTION OF PARTNERSHIP: *Chardon v. Otisphant*, 6 Am. Dec. 572, and note.

COOK v. COCKRILL.

[1 STEWART, 475.]

IN AN ACTION BY THE INDORSEES against the immediate indorser, the true consideration for the indorsement is the measure of the recovery.

ASSUMPSIT on a promissory note by the indorsee against his immediate indorser. The case turned upon the admissibility of evidence to show that the consideration for the indorsement was less than the face of the note. The evidence was rejected below, and judgment for the full amount given. This was assigned as error.

P. W. Taylor, for the plaintiff in error.

Martin, contra.

By Court, PERRY, J. It appears to us to be very clear that the evidence offered should have been received, for it is a well-settled principle that where the consideration passing between the indorsee and his indorser is not equal to the amount of the note, the indorsee in an action against the indorser can only recover the consideration which he has already paid; which makes the amount of damages which the indorsee is entitled to recover, as fixed by the liability of the parties to the instrument. It is expressly laid down, that the indorser will be allowed, when

sued by his immediate indorsee, to show what was the real consideration passing between them. If this suit was by the indorsee against the maker of the note, it would not be a defense to the action or lessen the damages for him to say the plaintiff purchased it at a discount; but as the defendant was the immediate indorser to the plaintiff, the proof offered that the note was indorsed to the plaintiff for a less sum than the note called for upon its face, should have been admitted, to ascertain the damages the plaintiff had sustained in consequence of the non-payment of the note by the maker: 13 Johns. 52.

Reversed and remanded.

GAYLE, J., not sitting.

CHRISTIAN v. SCOTT.

[1 STEWART, 490.]

VENDEE'S ACQUIESCING IN VENDOR'S FRAUD.—The vendee of a tract of land cannot resist the payment of the purchase price on the ground of fraud and failure of consideration when it appears that he entered upon and continued in the quiet possession of the land after he discovered the falsity of the representations that it was free from incumbrances.

DEBT on two notes payable to Evans and assigned to Christian. Plea, failure of consideration and fraud. It appeared that the notes were given in payment for a certain tract of land conveyed by Evans to Scott, represented by the former to be free from incumbrances; and that three days before this conveyance, Evans had conveyed in trust to Brandon. Scott knew of this deceit when he went to take possession, but, however, took the possession, and remained in quiet possession ever since. The court instructed the jury that if from the period of the sale to the present time the defendant had been in the uninterrupted possession and ownership of the land, they must find for the plaintiff; but that, if Evans had divested himself of title to the land before conveying to Scott, then there was a failure of the consideration for which the notes were given, and verdict should be for the defendant.

Verdict for the defendant.

Thornton, Brandon and Hutchinson for the plaintiff.

Clay, McClung and Hopkins, contra.

By Court, CRENSHAW, J. In relation to the instructions requested by the plaintiff's counsel in the county court, we are of

opinion that it clearly arose out of the testimony presented on the trial, that it was legal and proper, and should have been given by the judge to the jury.

As to the charge given by the court at the request of defendant's counsel, we think it was improper, because it was illegal and did not arise out of the testimony. It does not appear that there was any evidence going to prove that Evans had divested himself of title. The deed of trust was truly an incumbrance on the land, but can not be considered as an absolute conveyance by which Evans had parted with all his right and title, and whether Evans had or had not parted with his title, there was not a total failure of consideration, for the vendee had the use and occupation of the land from the period of the sale to the present time, which was a benefit to him, and therefore, in law, was some consideration. As to the fraudulent representation made at the time of the sale, by the vendor to the vendee, that the land was free from incumbrance, it appears that the vendee knew of the incumbrance when he took possession of the land; yet instead of rescinding the contract of sale, he confirmed the same, and acquiesced in the fraud, if any, by taking and continuing in possession, and afterwards paying a part of the purchase-money.

If there was a fraudulent representation, the vendee might have rescinded the contract as soon as he discovered the fraud; but having acquiesced in the fraud, and proceeded to take the benefit of the contract, he can not rely on this ground to avoid the payment of the purchase-money.

Perhaps in an action of covenant on the warranty expressed in the deed or implied in law, a subsisting incumbrance at the time of the sale would be evidence of a breach of covenant, and support the action without an eviction by title paramount; but we do not undertake to settle this principle, not thinking it necessary in the present case.

We are all of opinion that if the vendee, with a knowledge of the incumbrance, took possession of the land, and has continued in the quiet and undisturbed possession of the same, though there was fraudulent representation as to the title at the time of sale, he is yet bound to pay to the vendor, or his assignee, the purchase-money agreed to be paid. The judgment of the county court is reversed, and the cause remanded.

TAYLOR, J., not sitting.

RICHARDSON v. HOBART.

[1 STEWART, 500.]

THE DECREE OF THE COUNTY COURT directing the sale of land of an intestate's estate is evidence against third persons concerning the land sold. And this, although the whole record in that behalf is not produced, such decree being conclusive until regularly set aside.

THE FINAL CERTIFICATE OF TITLE, under the act of congress, settling Spanish claims, is sufficient evidence of title, and can not be questioned by a trespasser.

TRESPASS to try titles, brought by Hobart against Richardson. In support of his claim, Hobart gave in evidence the final certificate of the land office, issued to one Durett in 1825; and produced transcripts from the records of the land office which showed that Durett had petitioned the Spanish government for the land; that the petition was granted on condition that no one should be injured thereby; that thereafter Durett filed his claim with the commissioners of the United States land office, upon which the final certificate above mentioned was granted. Hobart had been in possession of the land since 1809 as tenant of Durett, until the latter's death, in 1819. Hobart also gave in evidence the transcript of the proceedings of the county court of Mobile county, containing an order of the court to sell the lands of Durett. Under this order the lands were sold, and purchased by Hobart, to whom a conveyance was executed. Richardson's counsel objected to the admission of any of the above evidence, except the deed referred to.

Richardson claimed title as a settler under the act of congress of April 2, 1824, entitled: "An act giving the right of pre-emption to certain settlers therein mentioned." The certified transcript of the list of such settlers contained defendant's name, and by it he appeared to claim title to a tract known as Cedar Swamp; but it did not appear that the defendant was ever recognized as a settler. He proved that he had occupied the land in dispute since 1819, and offered to show that the persons who had been cited to the county court on the order of sale as the heirs and representatives of Durett, were but illegitimate children of the latter's father.

The court charged the jury in favor of the plaintiff. Verdict accordingly. Whereupon Richardson assigned as errors, the improper admission of evidence, and error in charging the jury.

Parsons and Cooper, for the plaintiff in error.

Acre, contra.

By Court, GAYLE, J. The plaintiff's counsel contend that the transcript of the proceedings of the county court ought not to have been read in evidence, because the whole record in that behalf was not produced, and because it purports to be a transcript from the minutes, and not from the record.

In support of the first reason, the case of *King v. Croke*, 1 Cowp. 26, has been referred to, and on looking into that case, it is found to bear no analogy to the one under consideration. It arose under a statute of 9 George III, which had for its object the establishment of a particular road. It gave an authority to the corporation of London to purchase of individuals such lands as might be necessary to carry it into effect, and in case of the refusal to sell, the justices of the county, on the application of the corporation, were required to direct a jury to be summoned to assess the value of the land. The defendant, whose land had been condemned by the verdict of a jury and the order of the justices, removed the cause by certiorari into the court of king's bench. The proceedings had before the justices were set aside, on the ground that the directions of the statute had not been strictly pursued. Lord Mansfield laid down the rule that when special authority is delegated to particular persons to take away a man's property and estate against his will, it must be strictly pursued, and must so appear on the face of the proceedings; a rule dictated by the principles of common justice, and necessary and essential to the rights of the citizens. That case was reviewed expressly for the purpose of setting aside the order of the justices, and of showing that the persons authorized to treat for and purchase lands, had not acted in pursuance of the statute. The corporation were mere agents, and the justices had jurisdiction in such cases only as might be brought before them, in relation to this particular road. In the case at bar, the record of the county court was incidentally examined as a matter of evidence; unlike the justices', the county court is a court of record, having general jurisdiction over the estates of deceased persons. The force and effect of its proceedings and judgments can not be questioned or disturbed till they are carried to a high tribunal for revision. The point made by the plaintiff's counsel is fully embraced by the rule that the judgment of a court of competent jurisdiction is conclusive till regularly set aside. The order of sale by the county court was its judgment, and that judgment could not be impeached incidentally when introduced as a piece of evidence. It was, therefore, not necessary to introduce the whole proceed-

ings, in relation to the estate of Durett, on the trial of the cause.

The other objection, that it purports to be a transcript from the minutes, and not from the records of the county court, is equally unavailing. The proceedings are set out at length, reciting the orders which had been previously made, and show clearly that they are the genuine records of the proceedings of the court, though certified to be a transcript of the minutes. The case cited, *Ferguson v. Harwood*, 7 Cranch, 408, is not in point. In that case the court would not permit a transcript of minutes extracted from the judge's docket to be read in evidence to contradict a record duly certified under the act of congress prescribing the mode of authenticating records. The transcript introduced in the court below was very different from the minutes of the court's docket.

It is further objected, under the first assignment of error, that the Spanish permit originally granted to Durett, and the oath of Hobart, the plaintiff in the action, made before the commissioners long prior to his becoming interested in the land, were improperly admitted in evidence to the jury. It is not believed to be necessary for the plaintiff to go beyond the final certificate of Durett to establish his title. If his claim was deemed sufficient to entitle him to a patent, by the tribunal established by the government to investigate it, the sufficiency or competency of the evidence on which that tribunal acted can not be questioned by one in the situation of the defendant below. He does not appear to have had any other claim than that of mere occupancy of a part of the land from the year 1819.

It is true, his name appears on a list of settlers, as reported by the register and receiver, but by the remarks of the register subjoined to that list, he was not recognized as a settler entitled to land under the acts of congress. And when it is remembered that Durett had been in constant possession of the premises from the year 1809, under a Spanish permit, obtained as early as the year 1800, he can be regarded in no other light than that of a trespasser. He had, therefore, no right to question the validity of the title derived from the United States.

Under the second assignment of error, the plaintiff's counsel renew their objections to the proceedings of the county court, and refer to a number of instances in which they suppose that court to have erred. These objections are embraced by the view taken of this subject in considering the first assignment of error, in which it is shown that being a court of competent

jurisdiction, its records and judgments are in full force, and can not be questioned till they are legally set aside. But it is said the county court had no jurisdiction over the land in dispute, because Durett was not seised of it at the time of his death. The evidence does not authorize this conclusion. It does not appear but that he had been in the continual possession from the year 1800 till his death, a period of nearly twenty years, and that his possession was coupled with a right of possession, derived from a title from the Spanish government, which has been recognized and confirmed by the United States. He had then such an estate in the land as constituted his possession, legally and technically, a seisure. We are therefore of opinion that the circuit court did not err, either in admitting the evidence stated in the bill of exceptions, or in its charge to the jury.

Judgment affirmed.

CRENSHAW, J., not sitting.

BOARDMAN v. GORE.

[1 STEWART, 517.]

BOND WITH PAYEE'S NAME IN BLANK, given with authority to fill up the blank, will entitle the payee to insert his name.

SUCH AUTHORITY NEED NOT BE UNDER SEAL nor in writing; it may rest in parol.

DEBT against Gore and Williams on a joint and several note, under seal, made by them to Garner or bearer, and transferred to plaintiff. The defendants pleaded separate pleas. Gore's first plea alleged that the writing was not his deed, as it was executed in blank as to the name of the payee, and that his name was inserted afterwards. Replication averring that Gore made the writing authorizing ——— to insert the name of the payee therein. Rejoinder generally, and issue joined. Williams filed a general plea of *non est factum*, on which there was an issue. It appeared on the trial that this bond was one of many executed to a company of men; that it was the intention of the company after receiving them to divide them among themselves; that the bonds were all made payable to bearer, and a blank left for the payee's name; and "that there was a general understanding that all the notes of the description of the one in question should be filled up with the name of the person to whom they should be allotted on a division of the notes among

the company, which division was made after the signing of the note."

At the request of the defendant's counsel, the court instructed the jury, "that in considering the issue taken on the plea of the defendant Williams, they should disregard all evidence to show an authority to insert in said bond, after signing and sealing thereof, the name of the payee;" and further, "wholly to disregard all parol evidence going to show an authority by said defendant Gore, to insert in said bond, after the same was signed and sealed, the payee's name; and that a payee's name could only legally be so inserted by virtue of an authority for the purpose under seal." Verdict for the defendants. Error assigned that the above instruction was erroneous.

Collier, for the plaintiff in error.

Baylor, Shortridge and Ellis, contra.

By Court, TAYLOR, J. The question we have to decide is, was B. M. Garner authorized to insert his name as payee of this bond, after the division of the bonds among the members of the company?

It is not proved, but we are bound to presume, that Garner was one of the company among whom the instruments, of which the bond in question was one, was to be divided.

It has been insisted in argument that no agreement on the part of the obligors, that the names of the obligees should be inserted, can be inferred from the testimony; that it is only proved such an understanding existed among the members of the company, and even if such an alteration could have been legally made with the consent of the obligors after the instrument was signed and sealed, which is denied, yet no such consent appears. I am of a different opinion. It does appear to me that the only idea which will strike the mind from the evidence is, that the space for the insertion of the name of the obligee was left blank with the express understanding and agreement of the obligors that such space should be filled up by the person to whom, in the contemplated division by the company, this bond should be allotted.

Does the alteration, then, which was made in this bond, by virtue of the previous agreement between the parties, render it void? The ancient doctrine seems to have forbidden any change in the bond after it was executed, even with the express consent of all the parties; but no modern cases, it is believed, can be found to support it; on the contrary, it is overruled in Eng-

land: 1 Anst. 228; 2 Stark. 480, n. 1. In the United States almost every decision has sustained bonds which have been thus altered, and it has uniformly, so far as my examination has extended (and no case is produced to the contrary), been held that the agreement might be by parol: 2 Stark. 480, n. 1. It is even held that such consent may be implied from the nature of the alteration. Now it is difficult to conceive a case in which the implication would be stronger than in the present, were there no evidence to the fact.

It may, indeed, be well doubted whether the alteration was at all material. The bond was made payable to bearer, and it is by no means certain it is any more obligatory upon the obligors with, than without the name of an obligee.

But it is urged that the evidence was calculated to take Williams by surprise; that he had no notice from the pleadings of the manner in which the plaintiff intended to sustain the action. This objection comes from him with an ill grace. He filed the general plea of *non est factum*; to sustain that plea, he proves that no payee's name was inserted at the time he executed the instrument. Has not the plaintiff, who is an assignee, much more right to say that he is surprised by the nature of the defense? While he is preparing himself to prove that the defendant did sign, seal, and deliver the bond, all his evidence procured with so much trouble is rendered useless by an objection he did not anticipate. It is believed that the evidence of the plaintiff grew out of that of the defendant, and that it should have gone to the jury in the state of the pleadings.

It is, therefore, the opinion of this court that the circuit court erred in the instructions given to the jury, that under the plea of *non est factum*, filed by the defendant, Williams, the evidence that the defendant agreed that the name of the obligee should be inserted after he had signed and sealed the bond, should have had its full effect with the jury, if believed by them, to prove the bond to be the deed of Williams. It is also our opinion, that a parol agreement by Gore, that the obligee's name should be inserted, was as competent to prove that fact as his agreement under seal could be.

Judgment reversed and cause remanded.

LIPSCOMB, C. J., and PERRY, J., not sitting.

FILLING BLANKS IN WRITTEN INSTRUMENTS: See note to *Woodworth v. Bank of America*, 10 Am. Dec. 271, and *Stahl v. Berger*, 13 Id. 666 and note, showing the diversity of opinion in regard to the nature of the authority to fill blanks in writings.

WRIGHT v. SPENCER.

[1 STEWART, 576.]

TROVER LIES AGAINST AN OFFICER who sells without notice, property seized under process.

THE MEASURE OF DAMAGES in such case is the diminution in price produced by the irregularity of the sale.

TROVER for the value of a horse. Plea of justification that the defendant had seized the horse as an officer, under an attachment, and had sold him pursuant to an order made by the justice issuing the attachment, directing fifteen days' notice to be given of the time and place of such sale. The court charged the jury that where an officer justifies on the ground of legal authority, they must be satisfied that he conformed to that authority; and that if he had sold without giving the notice required by law, the sale did not change the right of property, and this action could be sustained. Defendant excepted. Verdict and judgment for the plaintiff.

Shortridge and Ellis, for the plaintiff in error.

Barlon and Stewart, contra.

By Court, WHITE, J. It is certain the process of the law will protect the officer who pursues it, but if he misuses or abuses it, that protection is taken from around him; notwithstanding, then, in this case, the original taking may have been lawful; if the defendant was guilty of a misfeasance, he thereby became a trespasser *ab initio*. A misfeasance is the improper performance of some act which might lawfully be done. The defendant here had a right to take and sell the property, but was bound to do it as directed by law. If, then, he sold without the legal advertisement, it was the improper performance of an act which might have been lawfully done; and he was, according to strict definition, guilty of a misfeasance. By this he was dismantled of his protection, and made a trespasser from the beginning. There can be no question but that he was liable to the action of trespass. In such an action, the plaintiff must show either an actual possession, or a general right of property, which would draw to it a constructive possession at the time of the trespass committed. Then, if trespass were the action, the objection, that the officer's having taken possession divested the property, would not avail. For though true to a certain extent, yet the misfeasance on his part would revest the property in the original holder, and the law would consider

it as having been there from the beginning. Now, in an action of trover, as well as in trespass, the plaintiff must prove either actual possession at the time of conversion, or a right of property, which gives constructive possession. In these particulars, then, the actions resemble each other, and if in trespass the first taking by the officer, and his qualified property, would not interpose a bar by reason of his subsequent misfeasance, I can not see why it should create the difficulty contended for in trover. The taking of the property tortiously constitutes a conversion, and the party injured may waive the trespass and bring trover. If, however, he deliver the property himself, or the defendant by lawful means gains the possession, the plaintiff is bound to prove a demand and refusal, an actual conversion, or an abuse of the trust reposed; or authority given to the prejudice of his rights. In this case the defendant did abuse his authority, and that, too, to some extent, at least to the injury of the plaintiff. There was then a conversion. Nor is it always necessary that the plaintiff should be injured to the full amount of his property on the one hand, or that the defendant should have appropriated the goods to his own exclusive use on the other. For though the plaintiff may have regained the possession of his property, he may, nevertheless, recover in this form of action to the extent of the injury actually sustained; and if A. deliver goods to B., and he deliver them over to a third person, without authority, it is a conversion on the part of B.; or if B. receive goods as a carrier, consigned to C., and he, by negligence, lose them, or even by mistake deliver them to a wrong person, he is liable in trover: 1 Chit. Pl. 154. From all which it is manifest that if the authority to possess goods, given either by the owner or the law, be by any positive act abused, it is a conversion, and trover will lie; and the recovery will, as in trespass or case, depend on the extent of the injury; with this limitation, that in trover you can not recover beyond the value of the property converted, and interest on that value. For these reasons, I think that this action was well brought; and, therefore, that the first objection is badly taken.

The charge of the court, however, is manifestly too broad in this, that it states that the sale by the defendant, without notice, did not change the right of property. We think that the sale, even though made without notice, would vest the property in the purchaser, though at the time of such sale the plaintiff had such a right as would enable him to maintain this action for the conversion which was then committed. Besides,

this charge had a direct tendency to induce the jury to give damages to the full value of the property, which, we think, in a case like this, where it was sold to pay his debt, should not have been recovered, but that he should have received a compensation for the diminution in price produced by the irregularity of the defendant, in not giving the proper notice. For this last error, therefore, the judgment must be reversed, and the cause remanded.

LINSCOMB, C. J., not sitting.

CASES
IN THE
SUPREME COURT OF ERRORS
OF
CONNECTICUT.

COOK v. BRADLEY.

[7 Conn. 67.]

MERE WRITTEN CONTRACT IS OF NO HIGHER DIGNITY THAN ONE BY PAROL,
and a consideration therefor must be proved.

MORAL OBLIGATION IS NOT SUFFICIENT to support a contract, except in cases
where a good or valuable consideration has once existed.

A SON IS UNDER NO LEGAL OBLIGATION to pay debts previously contracted
by his indigent father for the latter's necessary support; and his written
promise to pay such debts is without consideration, and therefore in-
capable of being enforced in law.

ERROR. . Bill in chancery brought by Bradley against Hannah Cook, administratrix of Henry Cook, praying for correction of a mistake in a discharge given by Bradley to Henry Cook, or for an injunction against its use in a suit at law then pending. The bill stated that Jonathan Cook was indebted to Bradley in the sum of sixty dollars for goods previously supplied to him, and which were necessary to his support, he being in indigent circumstances, and unable to provide for himself. Henry Cook, the only child of Jonathan Cook, was wealthy, and of sufficient ability to support his father. Henry Cook signed and delivered to Bradley a writing, certifying that he acknowledged the debt due by his father to Bradley to be for necessaries of life, and of such a nature that he considered himself thereby obligated to pay to Bradley the sixty dollars then due, provided his father did not pay the same in his life-time. Jonathan Cook died without having paid any part of said debt, and about two years later Henry Cook died. After his death, Bradley brought an action against his administratrix, on the writing, and she pleaded in bar the following discharge: "Received, Litchfield, January

5, 1820, of Henry Cook, ten dollars in full of all claims and demands to this date. Joel Bradley."

This discharge was given by Bradley on settlement of a suit between him and Cook, in which the sixty dollars formed no part of the controversy. By mistake the discharge was drawn so as to extend to all demands. Immediately after its execution, Bradley discovered the mistake, and requested Cook to allow it to be corrected, which the latter refused to do. On demurrer to the bill, the superior court adjudged the bill sufficient, and granted the decree sought. On defendant's motion, the record was transmitted to this court for revision.

Church and Smith, for the plaintiff in error. The contract on which plaintiff's action at law is founded is invalid for want of consideration. The necessities were furnished upon the credit and at the request of Jonathan Cook, and without expectation of recourse to Henry Cook. Not only was the consideration past and executed, but Henry Cook was an entire stranger to it: *Bulkley v. Landon*, 2 Conn. 404, 410, 416. There are but two classes of cases in which a moral obligation will constitute a legal consideration for a contract: 1. Where there has been an antecedent legal liability which can not now be enforced; 2. Where an act has been done at the request or for the benefit of the promisor, but under circumstances which do not impose a legal liability: *Smith v. Ware*, 13 Johns. 257; *Mills v. Wyman*, 3 Pick. 207; *Edwards v. Davis*, 16 Johns. 281, 283, n.; *Frear v. Hardenburgh*, 5 Id. 272 [4 Am. Dec. 356]; *Early v. Mahon*, 19 Id. 147 [10 Am. Dec. 204]; *Barnes v. Headley*, 2 Taunt. 184. This case comes within neither of these classes. Even a legal obligation in one right is no consideration for a promise to pay in another: *Rann v. Hughes*, 7 T. R. 350, n. The plaintiff has adequate remedy at law, for the instrument pleaded in bar may be there avoided by showing the mistake, as well as in chancery: 3 Stark. Ev. 1272, n.

Huntington and Sandford, for the defendant in error. Under the circumstances of this case the son was morally bound to pay for the supplies furnished: 1 Bl. Com. 453. This was sufficient consideration for his promise: *Atkins v. Hill*, Cowp. 288; *Hawkes v. Saunders*, Id. 290; *Trueman v. Fenton*, Id. 544; *Atkins v. Banwell*, 2 East, 505; *Lee v. Muggeridge*, 5 Taunt. 36; 2 Bl. Com. 142; Bull. N. P. 129, 147; 1 Esp. Dig. 95; 1 Selw. N. P. 1; 3 Wooddes. Lect. 143; 1 Fonb. Eq. 336; 2 Evans' Poth. 20; *Anon.* 2 Show. 184; *Andover & M. T. C. v. Gould*, 6 Mass. 43 [4 Am.

Dec. 80]; *Salem v. Andover*, 3 Id. 438; *Davenport v. Mason*, 15 Id. 94. This doctrine was never questioned in Massachusetts until the case of *Mills v. Wyman*, 3 Pick. 207. It has been maintained by the ablest judges in the state of New York: *Stewart v. Eden*, 2 Caines, 152 [2 Am. Dec. 222]; *Tioga v. Seneca*, 13 Johns. 382; *Doty v. Wilson*, 14 Id. 381; *Bentley v. Morse*, Id. 468. And it has been recognized as established law in our own state: 1 Swift's Dig. 204, 205. But if it were otherwise, a principle so consonant to natural justice ought to receive the sanction of this court.

The defendant was legally bound to support his father: Stat. 369. If the duty exists by law it matters not by what proceeding it is to be enforced. The relief of the suffering father's necessities was a benefit to the son.

The plaintiff has not an adequate remedy at law, for the instrument pleaded, though not technically a release, is so in legal effect. The courts of Connecticut have always treated such instruments as releases: *Carter v. Bellamy*, Kirby, 291; *Tryon v. Hart*, 2 Conn. 120; 1 Swift's Dig. 300. Under our statute they must be pleaded as releases: *Brace v. Callin*, 1 Day, 275. This instrument is conclusive and can not be explained at law: *Carter v. Bellamy*, Kirby, 291; *Pierson v. Hooker*, 3 Johns. 68, 70. A seal to instruments of this kind has never been considered material in this state: 1 Swift's Dig. 300; *Bacon v. Newton*, 5 Day, 128; *Tryon v. Hart*, 2 Conn. 120. A mistake in a written instrument can not be shown in a court of law. The invariable practice in such cases is to go into a court of chancery.

DAGGERT, J. The question presented on this record for discussion, arises on the validity of the promise of the deceased, Henry Cook, stated in the bill. If no action can be supported on that contract, then the interference of the court to exercise its chancery power, to explain or invalidate the discharge, would be useless, and the examination of other points suggested in argument, unnecessary. I am satisfied, on a full view of the case, that the contract is void for want of consideration, and, therefore, that no action can be supported on it.

1. The contract is not a specialty, though in writing; nor is it governed by the law merchant, applicable to negotiable paper. Were it of the first description, by the rules of the common law, the consideration would be locked up and could not be inquired into. Were it a note or bill of exchange, the law merchant would give to it the same force in relation to third persons. It is true that in *Pillans & Rose v. Van Mierop & Hopkins*, 3 Burr. 1663, a

suggestion was made by Wilmot and the judges who sat with him in the king's bench, that mere want of consideration could not be alleged in avoidance of a contract in writing. This suggestion was never established as law; and in the case of *Rann v. Hughes*, 7 T. R. 350, n., the true doctrine of the common law was laid down. A mere written contract is upon the footing of a parol contract, and a consideration must be proved. This is an inflexible rule of law, and the court is not at liberty, if it had the disposition, to subvert it. *Ex nudo pacto non oritur actio*.

2. What is a consideration sufficient to uphold a contract? Here, too, the common law furnishes the answer; a benefit to the party promising, or a loss to the party to whom the promise is made. The quantum of benefit on the one hand, or of loss on the other, is immaterial: Pow. on Cont. 343, 344. To multiply authorities on this point is quite unnecessary.

Let us now apply these uncontroverted principles to the case before us. Could Henry Cook possibly receive any benefit from this contract? He gained nothing—nothing was renounced thereby. Was he induced by any loss to the promisee? He advanced nothing; he became liable for nothing; he did not forego anything by or on the ground of it. He had before, not at the request of Henry Cook, but of Jonathan Cook, furnished the latter with necessaries for his support. It is impossible to discover, thus far, any consideration known to the law.

3. The defendant in error still insists that the father being poor and unable to support himself, and the son being possessed of a large property, a legal obligation rested on him to pay for these necessaries thus furnished; and a legal obligation is a good consideration for a promise. The conclusion is just if the premises are true. But was there this legal obligation? If it exist, it is to be found in our statute providing for the support of paupers: Stat. 369, tit. 73, c. 1. Provision is there made that poor and impotent persons, unable to support themselves, shall be supported by their children, if of sufficient ability. The manner in which they shall be compelled to furnish this support is prescribed. The selectmen of the town where the poor persons reside, or one or more of their relations, may make application to the county court, and the court may order such support to be supplied by the relations of the poor persons, from the time of such application. The facts are to be ascertained by the court. The provision is prospective only. It regards no supplies already furnished, or expenses already incurred; and the liability, the legal obligation, is precisely as

extensive as the law establishes it, and no greater. By this statute, then, for these reasons, the legal obligation alleged in support of this contract does not appear.

That such is the construction of this statute, I cite the opinion of the supreme court of Massachusetts in *Mills v. Wyman*, 3 Pick. 207, 212, as to a similar statute of that state; and especially I rely on the decision of this court in *Wethersfield v. Montague et al.*, 3 Conn. 507. One of the points settled in that case was that "no assessment could be made, by virtue of this statute, for past expenditures, the provisions of the statute being exclusively prospective." The principle, then, is that there is no legal obligation to pay past expenditures; which exonerates the son in this case from all legal liability for the expenditures of the father.

4. This opens to us the only remaining point. The counsel for the defendant in error urge that the son was under a moral obligation to support the father; that this is a sufficient consideration to uphold the promise; and that, therefore, the son is liable.

It can not be successfully contended that in every case where a person is under a moral obligation to do an act, as to relieve one in distress by personal exertions, or the expenditure of money, a promise to that effect would be binding in a court of law. Such an idea is unsupported by principle or precedent. It is a just rule of morality that a man should do towards others what he might reasonably expect from others in like circumstances. This rule is sanctioned by the highest authority, and is very comprehensive. An affectionate father, brother, or sister, has taken by the hand the youngest son of the family, given him an education, and placed him in a situation to become, and he has become, affluent. The father, brother, or sister, by the visitation of Providence has become poor, and impotent, and houseless. The son, rolling in riches, in the overflowings of his gratitude for kindness experienced, contracts in writing to discharge some portion of the debt of gratitude, by giving to his destitute relative some one of his numerous houses for a shelter, and a thousand of his many thousand dollars for his subsistence. Can such a promise be enforced in any judicial tribunal? Municipal laws will not decide what honor or gratitude ought to induce the son to do in such a case, as Dr. Blackstone remarks: 2 Bl. Com. 445; but it must be left to the forum of conscience.

It can not be denied that many distinguished judges have

laid down the principle, that moral obligation is alone a sufficient consideration to support a contract. Thus did Lord Mansfield, in *Cowper*, 288, 544. He was followed by Mr. Justice Buller, by Lord Ellenborough, and other judges, in other cases. But it is an obvious remark, that the cases cited in illustration of these positions, were all cases where a prior legal obligation had existed, but by reason of some statute, or stubborn rule of law, it could not be enforced; as a promise to pay a debt barred by bankruptcy, or the statute of limitations, or a promise by an adult to pay a debt contracted during minority. In all these instances a good consideration existed; for each had received a benefit.

All the cases on this subject are carefully, and with just discrimination, revised, in a note in 3 Bos. & P. 249, and the true distinctions taken. The law of this note has been recently adopted in the supreme court of New York in the cases of *Smith v. Ware*, 13 Johns. 257, 289, and *Edwards and ux. v. Davis*, 16 Id. 281, 283, n., and in a still later case (in the year 1826) in Massachusetts, viz.: *Mills v. Wyman*, 3 Pick. 207, a case referred to above for another purpose. No stronger case of moral obligation can be found. "A son who was of full age, and had ceased to be a member of his father's family, was suddenly taken sick among strangers, and being poor and in distress, was relieved by the plaintiff, and afterwards the father wrote to the plaintiff promising to pay him the expenses incurred. It was held that such promise would not sustain an action." I am well satisfied with the very able and sound reasoning of the court, delivered by Chief Justice Parker, on that occasion.

I will now advert to the particular decisions of the English courts, cited at the bar, and relied on: *Watson v. Turner*, Bull. N. P. 147. It is no longer doubted, that the defendants in that case, the overseers of the poor, were under a legal obligation to furnish the support for which the promise was made. It is a case, therefore, within the rule in 3 Bos. & P. 249 n. The case of *Scott v. Nelson*, cited Esp. Dig. 95, and an anonymous case in 2 Shower, 184, seem to imply that a father was holden liable on a promise to pay for supplies for his bastard child; but, in my opinion, it may be safely inferred from the facts, that the supplies were furnished on request; which would make a material difference. In *Wing v. Mill*, 1 Barn. & Ald. 104, the whole court held that a legal and moral obligation existed. In the case of *Barnes v. Headley & Conway*, 2 Taunt. 184, the court held that when the parties to usurious securities stripped them of all usury,

and the securities were given up and canceled, by agreement of the parties, and the borrower of the money promised, in consideration of having received the principal, to pay the same with legal interest, the promise was binding. This case rests upon the same principles, which were recognized by this court in the case of *Kilbourn v. Bradley*, 3 Day, 356 [3 Am. Dec. 237], where the court decided that if a usurious security be given up, and a new security be taken for the principal sum due and legal interest, the latter security will be good. This bears not at all upon the case under consideration. The money advanced was a good consideration of the promise to repay it, the usury being expunged. In the case of *Lee v. Muggeridge et al., executors of Mary Muggeridge, deceased*, 5 Taunt. 36, it was held that a *feme-covert* having given a bond for money advanced to her son-in-law, at her request, was bound by a promise made by her, after she became *discouvert*. Mary, the obligor in that case, had a large estate settled to her separate use. In this condition she executed a bond for money advanced to her son-in-law at her request. After the death of the husband, and while single, she wrote a letter, promising to pay the amount thus advanced. The court, in giving their opinion, say this is a promise founded on a moral obligation, and that it is a good consideration. I should say the promise was founded on the advancement of the money, at her request, to her son-in-law, and as she was incapacitated to bind herself by reason of the coverture, when she received the benefit, and is, therefore, protected from liability by a stubborn rule of law; yet if, when this rule of law ceases to operate upon her, she will promise to pay, it will bind her.

On the whole, I am not satisfied that a case can be found in the English books in which it has been held that a moral obligation is a sufficient consideration for an express promise, though there are many to the contrary, but that it is limited in its application to the cases where a good and valuable consideration has once existed, as laid down by the supreme court in *Massachusetts*, once and again adverted to.

I am therefore of opinion that there is error in the decree complained of, and that the judgment be reversed.

HOSMER, C. J., was of the same opinion.

PETERS and LANMAN, JJ., dissented.

BRAINARD, J., was absent.

Judgment reversed.

CITED by counsel in *East Hartford v. Pitkin*, 8 Conn. 398, in support of the proposition that the act to compel children, if of sufficient ability, to support their indigent parents, was not retrospective, and did not, therefore, provide for a reimbursement of any expenses already incurred. In *Barnum v. Barnum*, 9 Id. 251, to the point that all contracts are distinguished as agreements by specialty and agreements by parol. In *Raymond v. Sellick*, 10 Id. 484, as deciding that a promise in writing by a son to pay for necessities previously furnished to his father, is void for want of consideration; and to the same point in *North v. Forest*, 15 Id. 405, and in *Stone v. Stone*, 32 Id. 144. In *Craft v. Rolland*, 37 Id. 498, this case is cited to show that if the defendant in that case became bound, she was then under a moral and equitable obligation to pay the claim, which was a sufficient consideration for the promise which she subsequently made.

In *Kilbourn v. Bradley*, 3 Am. Dec. 273, held that the moral obligation of a borrower to pay the principal and interest was a sufficient consideration for a new security for the sum advanced and legal interest, which new security was taken instead of and upon the giving up of a previous usurious security. In *Nixon v. Vanhise*, 8 Id. 618, it was decided that a promise by a son to indemnify a constable in the sale of goods levied on as the property of his father, was not founded on such a moral obligation as to furnish a sufficient consideration for the promise.

BEARDSLEE v. FRENCH.

[7 CONN. 125.]

SURVEY OF HIGHWAY MUST DEFINE ITS BOUNDARIES with reasonable certainty, and a survey of a mere line extending in length only, without breadth, is not competent as evidence to prove the existence of a highway.

NON-USER OF A HIGHWAY FOR MANY YEARS is *prima facie* evidence of a release of the right to the person over whose land it once ran.

WANTON AND UNNECESSARY DESTRUCTION OF PROPERTY by persons removing obstructions from highway, is a trespass for which they are liable to an action.

TRESPASS *quare clausum fregit* for throwing down and removing the plaintiff's bars and posts. At the trial, under the general issue, the plaintiff proved the acts complained of. The defendant justified on the ground that there was a public highway through plaintiff's close, and that said posts and bars were upon and across such highway. To prove that there was such a highway, he offered in evidence two votes of the proprietors of Stratford, one passed at a meeting held on the second Monday of March, 1735, by which a committee was appointed to "lay out and rectify all such highways as are absolutely necessary in the aforesaid divisions;" the other at a meeting on the second Tuesday of April, 1735, by which any three of the committee chosen at the previous meeting were constituted and

"deemed to be a number sufficient to lay out or survey any lands granted at said meeting to be surveyed and laid out." Defendant then offered in evidence a survey or laying out, dated December 27, 1737, signed by three persons designating themselves Proprietors' Committee, and certifying that they had laid out a highway, and giving the courses and distances.

Plaintiff objected to the admission of this evidence on the grounds: 1. That defendant had not shown that the committee were authorized to survey and lay out highways; 2. That the survey was on its face void, because it was not bounded nor of any definite width; 3. That defendant had not produced any evidence to show that the survey was ever accepted by the proprietors. The judge overruled the objections, and admitted the evidence. Plaintiff then offered to prove that for about ninety years bars had been kept up across that part of the way where they were removed and destroyed by the defendant. The judge, on the objection of the defendant, excluded this evidence. Plaintiff prayed the court to instruct the jury that if the defendant, even though there was a highway, had wantonly and unnecessarily destroyed the property of the plaintiff, he must be found guilty. The judge refused to instruct the jury on that point, and further instructed them that the survey was not on the face of it void, but was a valid laying out of a highway of convenient width. There was a verdict for the defendant, and plaintiff moved for a new trial.

Beardsley, in support of the motion.

Sherman, *contra*.

HOSMER, C. J. 1. From the survey received in evidence, it appeared that the supposed highway was a line, extending in length, but without breadth or any limits bounding its surface. A highway, which is a public right of passage over another man's ground, like a grant from an individual, must be defined with reasonable certainty. The public must have the means of knowing how far they may travel without becoming trespassers, and the individual, to what extent his land may be occupied by others. But in the survey above mentioned, there are no limits to the rights of passage, nor to the incumbrance on the land of another, nor any possibility of ascertaining the extent of either. A mathematical point is as fit a representation of a tract of land conveyed, as a mathematical line is of a highway. The survey, for these reasons, was incompetent evidence.

2. Evidence to prove a highway often consists in showing that the public have used and enjoyed the road, and the uninterrupted use of it for a considerable space of time, affords a strong presumption of a grant. On the other hand, the non-user of an easement of this kind for many years, is *prima facie* evidence of a release of the right to the person over whose land the highway once ran; and although the precise limit of time in respect of the public in such cases has not been established, there can be no doubt that the desertion of a public road for nearly a century, is strong presumptive evidence that the right of way has been extinguished. After a long possession in severalty, even a partition may be presumed: *Hepburn v. Auld*, 5 Cranch, 262.

The evidence should have been received by the court; and the rejection of it was, unquestionably, an error.

3. The omission of the court to instruct the jury that the wanton and unnecessary destruction of the posts and bars by the defendant, in removing them, was a trespass, was an unquestionable error. If the plaintiff had erected posts and rails across a highway, or on the defendant's land, the defendant might legally remove them, doing no unnecessary damage; but the law admits of no wanton spoil or waste, even in such cases. It is sufficient that a person may put out of the way all impediments to the enjoyments of his rights, without inflicting unnecessary injury on the rights of others: *Welch v. Nash*, 8 East, 394; *Vid.* 2 Phil. Ev. 138.

A new trial, in this case, must be granted.

LANMAN and DAGGETT, JJ., were of the same opinion.

PETERS and BRAINARD, JJ., were absent when the case was argued; and, of course, gave no opinion.

New trial to be granted.

Cited in *Lyman v. Hale*, 11 Conn. 185, to show that if the branches of a tree hang over a man's land, he may remove them as a nuisance if they are such, but he has no right to convert the branches or the fruit on them to his own use. In *Brownell v. Palmer*, 22 Id. 121, that the non-user of a highway for many years, was *prima facie* evidence of a release of the public right to the owner of the soil.

Held, in *Commissioners v. Taylor*, 1 Am. Dec. 647, that non-user for a great number of years is sufficient to forfeit a right to a highway.

READING v. WESTON.

[7 Conn. 143.]

MAGISTRATE BEFORE WHOM DEPOSITION IS TAKEN must, under statute of this state, certify the reason for taking it; and his omission to do so can not be supplied by parol evidence.

DECLARATIONS MADE BY PERSON WHILE OCCUPYING LAND are admissible to show the nature and extent of his occupation; but such declarations have no effect when made by one who occupied under absolute deed from former owner.

EXECUTION AND DELIVERY OF SUCH DEED UPON THE LAND GRANTED is equivalent to livery of seisin, and transfers the legal estate and possession to the grantee; and if the grantor continues to reside thereon, it must be under the grantee.

MERE CONTRACT TO RECONVEY IS NOT SUCH DEFEASANCE as will convert an absolute deed into a mortgage; for where there is no debt to be secured there can be no mortgage.

ASSUMPT for supplies furnished to the wife and minor children of Samuel Darling. Samuel Darling derived his settlement from Lucy Darling, his mother, who had a legal settlement in Weston until March, 1808. In that month, one Burr conveyed to her, by an absolute deed, a tract of land in Reading, for the sum of eight hundred dollars. At the same time and place she executed and delivered to him a written obligation in which she bound herself to reconvey to him said tract of land, and the buildings thereon, if within three years he should bring to her the eight hundred dollars, with interest thereon for the three years. But in case he failed to do so, he was to forfeit all claim to such reconveyance. Immediately after the delivery of the deed and writing, she, with her son, Samuel, then about seven years old, removed to the dwelling-house upon said tract of land, and lived there until 1813, when she removed to the state of New York, where she still lives.

The plaintiffs claimed to have proved that Lucy Darling had only taken possession of a part of the premises, worth less than one hundred dollars, under an agreement with Burr that she should occupy that part, and that he should occupy the residue, upon payment to her of forty-eight dollars a year, as interest on the eight hundred dollars, the consideration of the deed.

Defendants claimed that she went into possession of the whole, and that he occupied a part by her permission. To show that she occupied the premises in her own right they offered a deposition, taken in the state of New York, of a witness resident there, on which the justice before whom it was taken

had failed to certify the cause of taking it. Plaintiffs objected to the deposition on the ground that it was not duly certified, and to the witness on the ground that the absence of the certificate could not be supplied by parol evidence. The judge sustained the objections.

Plaintiffs offered several witnesses to show that Lucy Darling occupied the premises as claimed by them. One of these witnesses testified that he heard her say that the land was not hers, that she had no more to do with it than he had. Another, that he heard her say that she was in possession as tenant of Burr. And another, that he heard her say that she had not bought the premises. The judge admitted this evidence against the objection of the defendants, and instructed the jury that if they were satisfied that Lucy Darling was, by herself or her tenant, possessed of real estate in her own right in fee, in the town of Reading, of the value of one hundred dollars, during her residence there, they ought to find for the defendants, otherwise for the plaintiffs. The jury found for the plaintiffs, and the defendants moved for a new trial.

Smith and Swift, in support of the motion, contended that the witness testified to the cause of taking the deposition, and consequently the deposition itself ought to have been received. They cited Stat. 684, ed. 1808; *Swift's Ev.* 114; *Thompson v. Stewart*, 3 Conn. 171 [8 Am. Dec. 168], to show that, under the statute previous to the late revision, the omission to state the reason in the certificate of the magistrate might be supplied by proof *aliunde*, and that the legislature did not intend, by the revision, to change the law.

That the declarations of Lucy Darling, since they did not show the nature of the possession, nor constitute any part of the *res gestæ*, ought not to have been admitted, because she herself was a competent witness, and could have been had, or her deposition obtained: *Nicholas v. Hotchkiss*, 2 Day, 126.

Lucy Darling became the owner of an estate in fee notwithstanding the writing she gave to Burr. A debt or duty, which can be enforced, is essential to a mortgage: *Pow. Mort.* 173; *Com. Dig.*, tit. Chancery, 4 A. 3; 1 *Mad. Chan.* (ed. 1822); 2 *Swift's Dig.* 181. This writing was merely a contract to reconvey, within a certain time, on payment of the purchase money and interest. The title vested in her before the writing was given, and therefore there was a time when she was possessed of the land in fee: *Barkhamsted v. Farmington*, 2 Conn. 600, 603.

Even if there was a mortgage, she was possessed of the title in fee. The mortgagee is the legal owner of the estate: *Clark v. Beach*, 6 Conn. 143, 354. The judge ought to have charged the jury that she was in possession of the property, for she was in the actual possession of a part of it, and Burr was in possession of the rest as her tenant under an agreement to pay her rent.

Sherman and Booth, *contra*, contended that the deposition was properly rejected, because the revised statute expressly requires that the justice shall certify the reason of taking the deposition: Stat. 47. If the certificate was indispensable, parol evidence could not be admitted to prove it.

The declarations of Lucy Darling, while in possession, were properly received as part of the *res gestæ*, and to explain the character of the possession: 1 Stark. Ev. 48; Phill. Ev. 201; *Williams v. Ensign*, 4 Conn. 456; *Jackson v. Vredenberg*, 1 Johns. 156. The deed and writing taken together constituted a mortgage. It appears from the documents that there was a debt. But if a debt did not so appear, it might be proved *aliunde*: *Peterson v. Clark*, 15 Johns. 205; *Erskine v. Townsend*, Mass. 493 [3 Am. Dec. 71]; *Taylor v. Weld*, 5 Mass. 109; *Carey v. Rawson*, 8 Id. 159; *Dey v. Dunham*, 2 Johns. Ch. 189; Swift's Dig. 163; Pow. Mort. 151; *Manlove v. Ball*, 2 Vern. 84.

The mortgagor is the owner of the land, and may gain a settlement by virtue of his estate as mortgagor: *The King v. Edington*, 1 East, 288, 293; *Barkhamsted v. Farmington*, 2 Conn. 605.

By PETERS, J. 1. The first ground on which the defendants claim a new trial is, that the deposition of Lucy Darling was rejected. This was in obedience to the statute which directs that "the magistrate shall certify the reason of taking such deposition." But it was not done; and the omission can no more be supplied by parol than any other official act of the magistrate.

2. Another ground is, that the declarations of Lucy Darling, while occupying the land in Reading, were admitted. Such declarations are always admitted to show the nature and extent of such occupation, and as part of the *res gestæ*. But in this case they could have no effect, as she occupied under an absolute deed from the former owner.

3. The defendants claim that the court ought to have charged the jury that from the facts conceded Lucy Darling was pos-

sessed, in her own right in fee, of real estate in Reading, of the value of one hundred dollars, during her continuance therein. The execution and delivery of the deed from Joseph Burr to Lucy Darling upon the land in question were equivalent to livery of seisin, and gave her possession; and if Burr afterwards occupied any part, it must have been under her; for the legal estate was in her, and they lived peaceably together in the same house.

4. It is claimed that Lucy Darling executed and delivered to Joseph Burr a defeasance, which converted his deed into a mortgage. But this defeasance was a contract to reconvey upon certain terms. There was no debt to be secured; and there was no mortgage in the case.

As the charge of the judge was incorrect, I advise a new trial.

HOSMER, C. J., and LANMAN, J., were of the same opinion.

BRAINARD, J., was absent; and DAGGETT, J., having been of counsel in the cause, gave no opinion.

New trial to be granted.

Cited in *People's Savings Bank v. Collins*, 27 Conn. 145, to the point that if a creditor levies upon an equity of redemption, and has it set off to him, he can not deny or call in question the validity of the prior incumbrance, especially for usury, of which the borrower, if any one, is the proper person to complain.

PECK v. BOTSFORD.

[7 Conn. 172.]

GENERAL CLAUSE IN WILL DIRECTING ALL JUST DEBTS OF TESTATOR TO BE PAID, will not revive a debt barred by the statute of limitations.

ACKNOWLEDGMENT BY EXECUTOR OF DEBT of decedent, barred by the statute of limitations, will not take the case out of the statute.

ACTION of book debt. Defendants pleaded the statute of limitations in bar of plaintiff's action. On the trial the plaintiff offered in evidence the will of Clement Botsford, executors' testator, which contained this clause: "After my just debts and funeral charges are paid." He also introduced evidence to prove that he had presented his claim to one of the executors, within the time for exhibition of claims against the estate, who acknowledged that a part of the claim was due. The defendants objected to this evidence, but it was admitted. They asked the court to charge the jury that this evidence would not support the issue, because the acknowledgment was made

by one of the defendants only, and by him as executor, and that it was not in writing; and because the clause in the will could not revive the debt. But the court charged the jury that the facts proved would authorize them to find the issue for the plaintiff, which they did. Defendants moved for a new trial.

Whittlesey and Sherman, in support of the motion, contended:

1. That a general clause in a will, directing the payment of the testator's just debts, is not sufficient to revive a debt which has been barred by the statute of limitations: *Roosevelt v. Mark*, 6 Johns. Ch. 266, 293; 2. An acknowledgment of the debt by one of the executors could not save it from the statute. The executor, as executor, had no power to bind the estate by such an acknowledgment: *Thompson v. Peter*, 12 Wheat. 565; *Roosevelt v. Mark*, 6 Johns. Ch. 292.

Smith and Dutton, contra, contended: 1. That the clause in the will took the case out of the statute: *Goflon v. Mill*, 2 Vern. 141; *Blakeway v. Strafford*, 2 P. Wms. 373; *Andrews v. Brown*, Prec. in Ch. 385; *Jones v. Strafford*, 3 P. Wms. 89; *Lacon v. Briggs*, 3 Atk. 107; *Anonymous*, 1 Salk. 154; *Trueman v. Fenton*, Cowp. 548; *Shallcross v. Finden*, 3 Ves. jun. 739; 2. That the acknowledgment proved on the trial took the case out of the statute: *Baillie v. Inchiquin*, 1 Esp. 435, 437; *Lord v. Shaler*, 3 Conn. 131 [8 Am. Dec. 160]; *Lord v. Harvey*, Id. 370; *Colledge v. Horn*, 3 Bing. 119; 3. That such acknowledgment by an executor, in a suit against him as executor, is sufficient. That he is a mere trustee makes no difference: *Bauerman v. Radenius*, 7 T. R. 663; *Bulkley v. Landon*, 3 Conn. 76; *Swift's Ev.* 128. That the point has been expressly decided: *Baxter v. Penniman*, 8 Mass. 133; *Emerson v. Thompson*, 16 Id. 429; *Johnson v. Beardsley*, 15 Johns. 4; *Martin v. Williams*, 17 Id. 330; *Mooers v. White*, 6 Johns. Ch. 372; *Secar v. Atkinson*, 1 H. Bl. 102.

By DAGGETT, J. The judge at the circuit charged the jury that the evidence given in support of the issue would authorize them to return a verdict for the plaintiff, to the end that the questions arising might be reserved for the opinion of this court. This course was peculiarly proper, because it had been decided by the superior court in December, 1826, when holden by another judge, that a clause in a will, like that shown in evidence on this issue, was sufficient to revive a debt against which the statute of limitations had run; and a writ of error was pending when this cause was tried in the court of errors,

seeking to reverse that judgment: *Vide Weed v. Bishop*, 7 Conn. 128.

Two questions are now to be considered, both of which are open for examination and decision in this court: 1. Will a general clause in a will, directing all just debts to be paid, revive a debt barred by the statute of limitations? 2. On an issue formed in the action of debt by book, on the point whether the plaintiff's cause of action accrued within six years, will an acknowledgment of the debt by an executor, support the issue on the part of the plaintiff?

If an affirmative answer be given to either of these questions, the verdict ought to stand; otherwise, it must be set aside, and a new trial granted.

1. On the first question, were it new, it would, in my view, be difficult to entertain a doubt. The words in the will designate no fund for the payment of debts; they contain no provision for the payment of this debt out of his estate; they are merely formal and introductory to particular directions in regard to the disposition of his property. The clause, "after my just debts and funeral charges are paid," thus inserted, has an importance given to it by the counsel for the plaintiff, which would never have entered a head not familiar with the *dicta* of lawyers and judges on this subject. The testator adopts this language as he does that commending his body to a decent burial, and his soul to the mercy of his Creator, in compliance with a custom almost universal, and, perhaps, having its origin in the solemnity which attends a final disposition of his earthly concerns. It is not credible that he thereby intends to direct the payment of any particular debt; much less to deprive his representative of the right of interposing a legal defense, arising under an act of bankruptcy, or the statute of limitations, or the law against usury, or other illegal considerations.

Again, this is an ancient form, probably introduced from English precedents, and might possibly have had some importance where it charged the payment of debts out of certain descriptions of property not otherwise liable for them. Here, every kind of property is equally bound for this purpose.

The counsel, however, rely on authorities from the English books, in support of their position. They cite to this effect: Toller, 288; Cowp. 548; 1 Salk. 154; 1 Mad. Chan. 483, 484; 3 Ves. jun. 738, 739. It is true, in many cases, such a doctrine is advanced by able judges; but it will be difficult to find an adjudged case going to the extent now contended for. When men-

tioned by many distinguished judges and chancellors, it is either directly denied or plainly questioned; and in a very late case, in the year 1813, the question was most elaborately discussed, and all the cases reviewed with great discrimination, by the vice-chancellor: *Burke v. Jones*, 3 Ves. & Bea. 275¹. He decided that a devise of real and personal estate for the payment of just debts, did not revive a debt upon which the statute of limitations had taken effect, by the expiration of the time, before the testator's death. In the case before us, the statute had attached on the debt, more than sixteen years before the testator's death, and ten years before the date of his will.

In the year 1818, the question came before the supreme court in Pennsylvania, and, after a thorough discussion, was decided against the position now taken by the plaintiff's counsel: *Smith v. Porter*, 1 Binn. 209. The opinion of the court, by the late Chief Justice Tilghman, is very satisfactory.

In 1822, Chancellor Kent took a critical view of this doctrine, and has furnished all the authorities on both sides of the question. He arrives at the conclusion that such a direction in a will does not revive a debt barred by the statute of limitations: *Roosevelt v. Mark*, 6 Johns. Ch. 266, 293.

It would savor too much of an affectation of learning to pursue the subject further. I entertain no doubt that the evidence arising from the clause in the will of Clement Botsford is insufficient to authorize a verdict for the plaintiff.

2. The other question now demands consideration. Will the acknowledgment and promise of the executor support the issue? To decide this question correctly it becomes necessary to examine the powers of an executor under our law. In *Fareman v. Bacon*, 6 Conn. 121,² the court declared that an executor was "an agent or trustee, and merely such, without any beneficial interest given to him by the will." He has, indeed, a legal right to the personal property, and it is vested in him to enable him to pay the debts and legacies of the deceased. He may also dispose of it under the direction of the court of probate. In both instances he acts immediately under the direction of the law regulating his conduct. The real estate not disposed of by will descends, *eo instanti*, on the death of the testator, to the heir; and, if devised, it goes to the devisees, liable in both cases to be taken and sold by the executor for the payment of debts. The residue, in both cases, belongs to the heirs or devisees, after deducting the debts and the expenses of settling

¹. *Burke v. Jones*, 2 Ves. & Bea. 275.

². *Bacon v. Fairman*, 6 Conn. 121.

the estate. The executor then, *quasi* executor, can neither give away the property nor squander it. If a man can do what he will with his own, he can not take the same liberty with the property of others. To apply these principles to the case under consideration: Can this executor bind the estate in his hands, real and personal, by an acknowledgment of a debt due from his testator, which had been barred sixteen years before his death? His duty, as executor, is to settle the estate according to law, not to subject it to debts by his declaration or admissions.

But several authorities are cited. First, it is said that an acknowledgment of a debt will take the case out of the statute: 3 Conn. 132, 372; 1 Esp. 435; 6 T. R. 189; 3 Bing. 119; 11 Serg. & Lowb. 59. Doubtless, it is well established by these cases and others that when a defendant interposes a plea of the statute of limitations, the plaintiff may repel it, by showing that he shall not avail himself of it, because he has renounced the benefit by an acknowledgment, which is sufficient to support a promise to pay it. This is not denied.

Secondly, admissions of the party to the record are always received in evidence: 7 T. R. 663; Swift's Ev. 128. This, also, is not questioned. But are they always sufficient to support the issue? The judge in this case charged the jury that they were authorized by this testimony to find a verdict for the plaintiff.

Thirdly, it is further said that the power of recovering a debt barred by the statute necessarily results from the situation and condition of the executor. In proof of this position, *Anderson v. Saunderson*, 1 Holt's N. P. 591; 3 Serg. & Lowb. 190, is cited. That case decides only that the confessions of the wife, she being his agent, bind the husband; a principle too familiar to be doubted.

Fourthly, the plaintiff insists on express decisions on the point. *Baxter v. Penniman*, 8 Mass. 134, shows only that an admission made to an executor or administrator is sufficient to take the case out of the statute of limitations. The debtor himself may certainly waive the statute. In the opinion given, however, the court speak to the following effect: "An admission by or to an executor or administrator, after six years, will, etc." So far as that opinion regards an acknowledgment by an executor or administrator, the case did not call for it; and therefore it is entirely *obiter*. In *Emerson v. Thompson*, 16 Mass. 429, the same doctrine is recognized, on a case where a new promise was by an executor, and the only case cited is that in 8 Mass

134, which, as has been shown, did not affect the point in controversy. In *Johnson, administrator of Johnson, v. Beardsley and heirs and devisees of Beardsley*, 15 Johns. 4,¹ it was decided that the promise of one joint debtor to pay a debt barred by the statute of limitation was sufficient to take the case out of the statute; and *Whilcomb v. Whiting*, Doug. 652; *Jackson v. Fairbanks*, 2 H. B. 350,² and *Smith v. Ludlow*, 6 Johns. 267, are cited. It was also decided that in an action against the heirs and devisees of a deceased debtor, a promise by two of the defendants, who were both executors, and heirs and devisees, to pay a debt, was sufficient to charge all the defendants. It is easy to see that this decision establishes nothing applicable to the present case.

The case of *Martin v. Williams, Executors of Williams*, in error, 17 Johns. 330, goes to the point only that in an action by an executor, an acknowledgment of the debt by the debtor within six years is evidence to support a new promise, and to remove the bar created by the statute. It is a recognition of the doctrine in 8 Mass. 134, before commented on.

In the case of *Mooers v. White*, 6 Johns. Ch. 372, the learned chancellor decided that "any acknowledgment or admission by an executor or administrator will not bind the real assets in the hands of an heir or devisee." I view that decision, not only as not affording aid to the plaintiff in the case before us, but as furnishing an argument against him. An executor, in Connecticut, has no more beneficial interest in the personal than in the real estate. He may control both, as a mere agent, subject to the directions of the court of probate.

The only cases cited by the counsel for the plaintiff, not already considered, are those in 1 H. Bl. 102, and 2 Saund. 117, *c.* note 2. They prove only that a count on an account stated with an executor for money due from the testator, may be joined with a count on a promise made by the testator; and that this is the usual mode of declaring against executors to save the statute of limitations. It is not easy to see how these cases prove the point for which they are introduced. If the utmost effect were given to them, they would only show that Mr. Justice Heath, and his commentator, Williams, assert that the object of this mode of declaring is to prevent the operation of the statute of limitations. But were it to be admitted that the statute might be avoided by such an acknowledgment in Westminster hall, ought the doctrine to prevail here? I am

1. *Johnson v. Beardsley*, 15 Johns. 4.
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2. *Jackson v. Fairbanks*, 2 H. Bl. 340.

persuaded that if this doctrine exists at all, it has its origin in a principle never adopted in this state, viz., that the executor was entitled to the surplus of the personal estate of the deceased after payment of debts, and that, therefore, such an acknowledgment would directly affect his own interest. I perceive some reason for it, where the executor is thus in fact, and to substantial purposes, the owner of the personal estate, but none where he is a naked trustee.

My opinion in this case is confirmed by the decision of the supreme court of the United States, delivered by Chief Justice Marshall, in the case of *Thompson v. Peter*, 12 Wheat. 565. He there says: "Had this been a suit against the original debtor, these declarations would not have been sufficient to take the case out of the statute. But this is not a suit against the original debtor; it is brought against his representative, who may have no personal knowledge of the transaction. Declarations against him have never been held to take the promise of the testator or intestate out of the act. Indeed, the contrary has been held."

In conclusion, I am satisfied that the charge of the judge (indeed, it was *pro forma* merely, under the circumstances already stated), is not supported by any adjudged case, except that of *Emerson v. Thompson*, 16 Mass. 429, and that rests on *Baxter v. Penniman*, 8 Id. 134, which, in principle, involves no point now decided. The doctrine of the charge is directly opposed to the case of *Thompson v. Peter*, 12 Wheat. 565, which last case is consonant to reason and justice.

A new trial, therefore, must be granted; and it is some consolation to reflect that by this decision two grounds of evading the statute, now first attempted in Connecticut, are rejected. Neither a clause in a will directing all just debts to be paid, nor an acknowledgment by a personal representative that a stale demand is due, will defeat the operation of a beneficial statute, a statute of repose, already so much impaired by repeated decisions as to be divested of much of its importance.

New trial to be granted.

HOSMER, C. J., and LANMAN, J., were of the same opinion.

PETERS, J., dissented.

BRAINARD, J., absent.

Cited in *Forest v. Hunt*, 8 Conn. 185, to show that an unqualified and unconditional acknowledgment of a debt as originally just and yet subsisting, removes the bar of the statute of limitations. To the point that executors

have no right to subject the estate of their testators to liabilities by their admissions, in *Pease v. Phelps*, 10 Id. 68; *Crandall v. Gallup*, 12 Id. 373; *Isaacs v. Stevens*, 13 Id. 506. In *Hart's Appeal*, 32 Id. 540, to support the assertion that the courts of Connecticut have looked upon the lapse of time as furnishing a presumption of payment rather than as an arbitrary statutory bar to a valid claim.

In *Cobham v. Administrators*, 2 Am. Dec. 612, it was decided that a promise of an administrator took a debt of the decedent out of the statute. And in *Briggs v. Starke*, 12 Id. 659, it was held that a new promise made by one of several executors took the case out of the statute: See the note to the latter case for a full discussion of the power of an executor to revive a debt of his testator.

STOW v. WYSE.

[7 CONN. 214.]

ACTS DONE AT A CORPORATION MEETING OF WHICH NOTICE WAS NOT GIVEN in the manner prescribed by its charter or by-laws are void; and where no mode of giving notice is provided by charter or by-laws, personal notice must be given to the stockholders.

GENERAL AGENT OF CORPORATION HAS NO POWER TO CONVEY the real estate of the corporation; to effect such an object a specific authority is indispensable.

ESTOPPEL BY RECITALS IN DEED.—A party who has admitted a fact in his deed, is estopped, not only from disputing the deed, but every fact which it recites, and so are all persons claiming under and through him.

TRESPASS quare clausum fregit. It was admitted that defendant was in possession as tenant of the Middletown bank. The bank derived title from a mortgage deed from the Middletown Manufacturing Company. Plaintiffs derived their title from a mortgage deed executed by Magill several years after the execution of the deed to the bank. Magill acquired title by the levy of an execution in his favor against the company, also subsequent to the deed to the bank. The deed to the bank was executed by Magill as agent of the company, under authority conferred upon him by a meeting, which the plaintiffs offered parol evidence to show had convened and passed the vote, without any notice to the other members of the company, several of whom resided in Middletown. Magill had been previously appointed the general agent of the company. The other facts are sufficiently stated in the opinion.

The judge charged the jury that the appointment of Magill as general agent did not empower him to mortgage the real estate of the company; that if no notice was given of the meeting at which he was authorized to execute the mortgage, it was not an act of the company, and did not confer upon him the

power to execute the deed; and that the plaintiffs were not estopped from showing these facts to avoid the deed. There was a verdict for the plaintiffs, and the defendant moved for a new trial, on the ground of misdirection.

Smith and Sherman, in support of the motion, contended: 1. That Magill, as general agent of the company, had power to mortgage the property in question. According to modern decisions, a corporation, like an individual, is responsible in the manner it permits its agent to hold it out to the world: *Bulkley v. Derby Fishing Company*, 2 Conn. 252 [7 Am. Dec. 271]; 2. That as Magill conveyed the premises, stating in his deed that he had power to convey, he is estopped from denying that power, and so are all who claim under him: *Willoughby v. Brook*, Cro. Eliz. 756; *Stroud v. Willis*, Id. 362; *Fairtitle v. Gilbert*, 2 T. R. 169, 171; *Jewell's Case*, 1 Roll. 408; Com. Dig. title Estoppel, A. 2; *Palmer v. Eakins*, 2 Stra. 817; *Coe v. Tulcoll*, 5 Day, 88.

Stanley and Williams, *contra*, contended that Magill was not estopped from denying that title passed from the bank to the company. An indispensable requisite of an estoppel is that it must be reciprocal: *Bradford v. Bradford*, 5 Conn. 127, 132; *Shep. Touch.* 277; *Brereton v. Evans*, Cro. Eliz. 700. Magill could not, by estoppel, treat this as a valid deed; and, therefore, the defendant can not, by estoppel, make it valid as against him.

DAGGERT, J. The plaintiffs who claim under A. W. Magill's deed to them, allege that no title passed by the deed to the Middletown bank; for that Magill had no authority to bind the Middletown Manufacturing Company, and transfer the title. The deed is attempted to be supported, or, rather, Magill's power is to make it, on two grounds. The first is, the vote of the Middletown Manufacturing Company, passed on the twenty-ninth day of March, 1817, the day of the execution of the deed, by which he was authorized to make a mortgage to the bank of the premises. On the other hand, it is insisted that the meeting was illegal, and the acts done void. It is very clear that a meeting of the stockholders, constituted as this was, could do no acts binding on the company. Though a meeting regularly warned would be competent to do any act within their chartered powers by a bare majority, yet, if not thus warned, their act must be void. If no particular mode of notifying the stockholders be provided, either in the charter or in any by-law, yet personal notice might be given; and this, in such case, would be indis-

pensable. The counsel for the defendant do not press this point, and I think it quite untenable.

The second ground taken in support of the power of Magill to execute the deed is, that he was the general agent of the company. It becomes necessary here to ascertain the extent of his powers as agent. By the sixth section of the act incorporating the Middletown Manufacturing Company, the directors of the company were authorized to appoint such clerks, agents, and servants as they judge necessary. Magill, when he made the deed in question, was acting under an appointment made by the directors of the company, on the twenty-fourth of May, 1816. By this act of the directors; and by this alone, his powers were conferred. It is not to be denied that they are general; but still they must be limited by the duties to be performed and the business to be transacted. This is reasonable, and results necessarily from the nature of the case, and is analogous to powers conferred in all similar instances. It was never thought before, that a mere agent of a manufacturing company was authorized to transfer, by deed, the real estate of the company. It may be incidental to his power as agent to borrow money, give promissory notes, and do many other acts in the ordinary course of the business of the company; but the idea is quite novel, that merely as agent, he might sell or convey the real estate. To effect such an object a specific authority seems indispensable. Nor is there any principle or precedent in support of the power set up in this case. The deed, therefore, cannot be upheld on either of these grounds; and thus far the charge is strictly correct.

Another position, however, is taken by the counsel for the defendant, which is fatal to the plaintiff's title. A. W. Magill is estopped by his deed to the Middletown bank, to allege that he was not authorized by the Middletown Manufacturing Company to convey; and if so, it is not doubted that his grantees are estopped. On this point the judge charged the jury *pro forma* merely, and to the end that the question might be settled in this court, and thus future litigation be prevented, that the plaintiffs might recover.

In looking into Magill's deed, it appears that he begins it with a declaration that he is the agent of the Middletown Manufacturing Company, authorized by vote of the company to execute the deed, and in pursuance of the power he executes it, and in behalf of the company covenants that they are well seised, and that they will warrant and defend the premises. There are

high opinions that if he was not authorized he is personally bound by the covenants; and that an action might be maintained thereon against him: *White et al. v. Skinner*, 13 Johns. 307 [7 Am. Dec. 381]; *Skinner v. Dayton et al.*, 19 Id. 513 [10 Am. Dec. 286]; but waiving the consideration of a point not necessary to be decided, A. W. Magill is estopped by the declaration and covenants in the deed, that he was authorized ever to deny it. Without multiplying authorities on a point rendered clear by numerous cases, it is sufficient to state that where a party has solemnly admitted a fact, by deed, under his hand and seal, he is estopped not only from disputing the deed itself, but every fact which it repites: 2 Stark. Ev. 30; 1 Phill. Ev. 416; *Huntington v. Havens*, 5 Johns. Ch. 26. Now Magill has declared, under his hand and seal, that he was empowered by a vote of the company to execute the deed. Can he ever say that he was not thus empowered? If, on the next day after the deed to the bank was executed, he had procured a valid deed from the company, and had brought ejectment against the bank, could he have sustained it against the declarations in his deed? I think he must have been estopped. If so, then all persons claiming under and through him are estopped: 1 Stark. Ev. 305; *Hoyt v. Dimon*, 5 Day, 483; 1 Phill. Ev. 10.

These principles are in entire accordance with the cases of *Fairtile d. Mylton et. al. v. Gilbert et al.*, 2 T. R. 169, 171; *Palmer v. Elkins*, 2 Stra. 1817; Com. Dig. tit. Estoppel, A, 1, 2, 3, and B.

There must, therefore, be a new trial.

The other judges were of the same opinion, except BRAINARD, J., who was absent.

New trial to be granted.

VALIDITY OF CORPORATE ACTS DONE OR AUTHORIZED AT MEETING NOT PROPERLY CALLED.—It is a general principle of law that notice, in some way or other, must be given to every person entitled to be present at a meeting of a corporation. And "to support the validity of corporate acts each member must be actually summoned:" *Angel & Ames on Corp.*, sec. 492; *Dillon on Mun. Corp.*, sec. 201; *Potter on Corp.* sec. 336. "Due notice of the time and place of a corporate meeting is, by the English law, essential to its validity, or its power to do any act which shall bind the corporation:" *Dillon on Mun. Corp.* sec. 200. And "when there is no different provision in the charter or by-laws of a corporation, such meetings must be called by giving personal notice to each member of the board of trustees:" *Harding v. Vandewater*, 40 Cal. 77; *People v. Batchelor*, 22 N. Y. 128; *People's Ins. Co. v. Westcott*, 14 Gray, 440; *State v. Ferguson*, 23 N. J. Law, 107; *Wiggin v. Freewill Baptist Church*, 8 Meta.

(Mass.) 301; Grant on Corp. 156; *Rez v. Doncaster*, 2 Burr. 738; *Rez v. Liverpool*, Id. 723; *Rez v. Theodorick*, 8 East, 543.

Private corporations generally set apart a particular day for the election of officers; and when a day is thus appointed, no particular notice is required: *Angell & Ames on Corp.*, sec. 488; *People v. Peck*, 11 Wend. 604; *Rez v. Hill*, 4 Barn. & Cress. 441. So, if a particular day in each year is appointed for the transaction of all business, a notice of the particular business to be done is not required: *Angell & Ames on Corp.*, sec. 488; *Warner v. Mower*, 11 Vt. 385; *Sampson v. Bowdoinham S. M. Corp.*, 36 Me. 78; *People v. Batchelor*, 22 N. Y. 123. It is immaterial in what manner the stated meetings of the corporation have been fixed. If they are in fact regularly held on stated days, that is sufficient: *Atlantic Mut. F. Ins. Co. v. Sanders*, 36 N. H. 252. And the notice of a special meeting, when it is held for the transaction of ordinary business, need not state the object of the meeting: *Savings Bank v. Davis*, 8 Conn. 191. But notice is required, when business of special importance, not in the general line, is to be transacted on any day not expressly set apart for that particular transaction, and unless such meeting is so noticed, all its acts will be illegal and void: *Potter on Corp.*, sec. 343; *Angell & Ames on Corp.*, sec. 489; *Rez v. Liverpool*, 2 Burr. 723; *Rez v. Doncaster*, Id. 738; *Rez v. Theodorick*, 8 East, 543; *People's Mut. Ins. Co. v. Westcott*, 14 Gray, 440. And the levying of an assessment was held to be an act of such importance that it could not be done at a special corporate meeting unless the stockholders were duly notified of the purposes of the meeting: *Atlantic De Laine Co. v. Mason*, 5 R. I. 463. So was the election of officers of a religious corporation: *Smith v. Erb*, 4 Gill 437.

A meeting of a corporation called to do certain acts which were to be done on that day, and no other, may be adjourned to another day in order to finish business which could not be completed on that day. And all corporations may transact any business at an adjourned meeting which they could have done at the original meeting, without giving other notice of such adjourned meeting: *Rez v. Curmarthen*, 1 Mau. & Sel. 702; *Warner v. Mower*, 11 Vt. 385; *Schoff v. Bloomfield*, 8 Id. 472; *Smith v. Law*, 21 N. Y. 296; *Scadding v. Lorant*, 3 H. L. Cas. 418.

When the members have all assembled, they may unanimously agree to waive notice of the meeting, but if a single person, having a right to vote, is absent or refuses his assent, all extraordinary proceedings of the meeting will be illegal and void: *Angell & Ames on Corp.*, sec. 495; *Rez v. Theodorick*, 8 East, 543; *Rez v. Gaborian*, 11 Id. 86; *Dillon on Mun. Corp.*, sec. 202.

Where the charter or by-laws of a corporation prescribe the manner of giving notice, it must be given in the manner provided: *Stockholders of Shelby R. R. Co. v. Louisville C. and L. R. R. Co.*, 12 Bush. 62. And it was decided in *Cogswell v. Bullock*, 13 Allen, 90, that a religious society which had regarded itself as a corporation, might call a meeting in the manner prescribed by its by-laws, and acts done at a meeting so called were held to be valid. In *Citizens' Mut. F. Ins. Co. v. Sortwell*, 8 Allen, 217, it was held that where the by-laws of an insurance company provided that a special meeting should be called by the president, or in his absence by the secretary, on application made to them in writing by ten members, this did not preclude the directors from calling special meetings without such application. So in *Smith v. Law*, 21 N. Y. 296, the by-laws of the corporation fixed stated days for directors' meetings, and provided that when less than a quorum, but more than three, should be present, they might adjourn to any day prior to the next regular meeting, and it was held that at a meeting so adjourned, the

acts of a majority of a quorum present were binding, though the absentees had no special notice of the adjourned meeting, other than that they were chargeable with from the by-law. In *People v. Batchelor*, 22 N. Y. 128, it was declared that corporators are bound to take notice of regular and notified meetings and adjournments thereof; but they are not bound to take notice of a special meeting called by a vote of a regular meeting at which they were not present.

Where the by-laws of a corporation are prescribed, not by the stockholders at large, but by the directors, if the directors disregard a by-law directing what notice shall be given of a special meeting, the corporation can not set up the irregularity in order to impair, as regards third persons, the validity of the acts of the directors: *Samuel v. Holladay*, 1 Woolw. 400.

The notice of a meeting ought to show that it was given by a person having authority to give it: *Johnston v. Jones*, 23 N. J. Eq. 216; *Stevens v. Eden Meeting House*, 12 Vt. 688; *Bethany v. Sperry*, 10 Conn. 200. But the want of authority in the person calling the meeting may be waived by the presence and consent of all who had a right to vote at such meeting: *Judah v. The American L. S. Ins. Co.*, 4 Ind. 333; *Jones v. Milton T. Co.*, 7 Id. 547. In the latter case the court said: "It is objected that notice of the meeting for the election of directors was not proved; but the objection is, in this case, unimportant, as, from the evidence, it appears that the subscribers here sued were present by their proxy and voted at the election." And in *People v. Peck*, 11 Wend. 604, it was held that an election of trustees of a church was good, although the requirements of the statute, with regard to notice, were not complied with, if the election was fairly conducted, and there was no complaint of want of notice.

A notice of a corporate meeting should state: 1. The time of the meeting, unless there is a regular time fixed in the charter or by-laws, of which every member is presumed to have notice: *Angell & Ames on Corp.*, sec. 488; *People v. Batchelor*, 22 N. Y. 128; *Atlantic Ins. Co. v. Sanders*, 36 N. H. 252. 2. The place where it is to be held, unless the place is settled and established by the charter or by-laws: *Angell & Ames on Corp.*, sec. 496; *Jones v. Milton & R. T. Co.*, 7 Ind. 547. 3. The business to be transacted thereat: *Sampson v. Bowdoinham S. M. Corp.*, 36 Me. 78; *Warner v. Mower*, 11 Vt. 385; *Merritt v. Farris*, 22 Ill. 303. 4. Notice should be personal, unless it is otherwise provided in the charter or by-laws: *Angell & Ames on Corp.*, sec. 491; *Evans v. Osgood*, 18 Me. 213; *Stevens v. Eden Meeting House*, 12 Vt. 688; *Bethany v. Sperry*, 10 Conn. 200; *Wiggin v. Freewill Baptist Church*, 8 Metc. (Mass.) 301; *Savings Bank v. Davis*, 8 Conn. 191. 5. The summons must be issued by one who has authority: *Angell & Ames on Corp.*, sec. 491; *Evans v. Osgood*, 18 Me. 213; *Stevens v. Eden Meeting House*, 12 Vt. 688; *Bethany v. Sperry*, 10 Conn. 200.

Cited in *Linsley v. Brown*, 13 Conn. 201, to the point that, in cases of estoppel, the instrument is supposed to be well executed by the party to be affected by the estoppel; and that the infirmity does not attach to the execution. To the point that a party is estopped by recitals in his deed, in *Rich v. Atwater*, 16 Id. 415, and in *Williams v. Robinson*, Id. 524. In *Smith v. Moodus W. P. Co.*, 35 Id. 398, to show that a party is estopped from denying that his intestate owned the land, when the lease contained a covenant of ownership.

STATE OF CONNECTICUT v. AVERY.

[7 CONN. 206.]

LIBELOUS WRITING.—Letter addressed to the wife of another, importing that she had acted libidiously toward the writer, and invited him to adulterous intercourse with her, and which was sent to her with intent to insult and abuse her, to seduce and debauch her affections from her husband, and to bring her into hatred and contempt, is libelous.

SENDING SUCH A LETTER to the person to whom it is addressed is a publication of the libel.

LIBEL AGAINST AN INDIVIDUAL is an indictable offense.

SOLICITATION OF ANOTHER TO COMMIT ADULTERY is a high crime and misdemeanor, of which the superior court has cognizance.

INFORMATION against the defendant for writing and sending a letter to Jannette White, wife of Alfred White, the meaning of a part of which, as explained by an innuendo, was that she had acted libidiously toward him, inviting him to an adulterous intercourse with her, and that she had sought opportunities to effect such purpose. The information averred that the letter was a false, scandalous, and defamatory libel, written with intent to injure the reputation of Mrs. White, and to bring her into disgrace and contempt. The defendant pleaded not guilty; but the jury found him guilty. He then moved in arrest of judgment for the insufficiency of the declaration, and the case was reserved for the opinion of this court.

Goddard and Brainard, in support of the motion, contended:

1. That the letter set forth in the information was not a libel.
2. That there was no publication of it as a libel.
3. That, in this state, a libel against an individual is not the subject of an information.
4. That this was not an offense within the jurisdiction of the superior court.

Isham, contra, contended: 1. That this was a libel: 2 *Swift's Dig.* 340; 1 *Hawk. P. C.* 352; *Commonwealth v. Clap*, 4 *Mass.* 163 [3 *Am. Dec.* 212]. 2. That a letter written and sent to another person is sufficient proof of a publication: *Phillips v. Jansen*, 2 *Esp.* 625; 3 *Chitt. Crim. Law*, 639; *Hick's case*, *Hob.* 215. 3. That an information for a libel on an individual is sustainable: *Const. Conn.*, art. 1, sec. 7; *Osborne's case*, at *Litchfield*. 4. That the offense charged is a high crime and misdemeanor. A solicitation or incitement to commit a crime is indictable: *The King v. Higgins*, 2 *East*, 5, 21; *The King v. Phillips*, 6 *Id.* 464, 470; *Rex v. Vaughan*, 4 *Burr.* 2494; *Rex v. Scofield*, *Cald.* 897.

PETERS, J. Whether the facts stated in this information are

a libel, or a solicitation to commit a greater crime, it is not now material to inquire. If they constitute an indictable offense within the jurisdiction of the superior court, it is sufficient. A libel is a malicious defamation of any person, made public by printing, writing, signs or pictures, tending to blacken the memory of the dead, with intent to provoke the living, or injure the reputation of the living, provoke him to wrath, and expose him to hatred, contempt or ridicule: 1 Hawk. P. C. cap. 73, sec. 1; 4 Bl. Com. 150; Holt on Libels, 73; *Hillhouse v. Dunning*, 6 Conn. 391.

Is the writing in question a libel? It is a letter addressed by the defendant to the wife of another man, stating that she had "played peep-abo" with him long enough; by which the jury have found that he meant that she acted libidinally towards him, and invited him to an adulterous intercourse and connection with her, and sought opportunities to effect it. It appears by the information, which the jury have found to be true, that the defendant composed and wrote the letter, and sent it to her with intent to insult and abuse her, and to seduce and debauch her affections from her husband, entice her to commit adultery, and bring her into hatred and contempt. Adultery is a detestable crime; especially in a female; the most disgraceful a woman can commit, and is punished with great severity by our law: Stat. tit. 22, sec. 62. To say of a woman falsely and maliciously that she has committed this crime, is a gross slander. To say that she is running about the country, seeking opportunities to commit adultery, renders her more contemptible and ridiculous than the crime itself; and to publish such a story, by printing or writing, is a libel. But a libel is a high misdemeanor; and it may be laid down as law, in all cases, that the allegation of an act which the law recognizes and punishes as a crime, is libelous: Holt on Libels, 188, 189; *Rex v. Wilkes*, 2 Wils. 151.

It is said that the letter in question is not a libel, because it was not published by the defendant. But it is well settled that the sending of a letter to the party filled with abusive language, is an indictable offense, because it tends to a breach of the peace. It has, indeed, been a matter of doubt whether the sending of such a letter to another would support an action for a libel, because there is no publication. But the sending of such a letter, without other publication, is clearly an offense of a public nature, and punishable as such, as it tends to create ill blood, and cause a disturbance of the public peace:

Holt on Libels, 239; 2 Swift's Dig. 341; 1 Hawk. P. C. lib. 1, cap. 73, sec. 11; Bac. Abr., tit. Libel, B.; *Wooton v. Edwards*, Poph 140; *Hick's case*, Hob. 215.

It is said that a libel against an individual is not a subject of indictment. "But there can not be any doubt," says Hawkins (*ubi supra*), "but that a writing which defames private persons only, is as much a libel as that which defames persons intrusted with a public capacity;" and Lord Coke informs us that "every libel which is called *famosus libellus*, is made either against a private man or against a magistrate or public person. If it be against a private man, it deserves a severe punishment:" *The case de Libellis Famosis*, 5 Rep. 125¹. The late C. J. Swift has informed us that prosecutions of this kind have not been introduced into this state; but he adds that "the common law on this subject is in force here:" 2 Swift's Dig. 340. It is somewhat remarkable that his honor should so soon have forgotten the prosecutions against Selleck Osborne, at Litchfield, in 1806, and Noah A. Phelps, at Hartford, in 1818.

But admitting that the letter in question is not a libel, it is certainly a solicitation to commit a greater crime. It explicitly invites Mrs. White to make an assignation to meet the defendant at his house, or at some other place, to commit adultery with him. I have already shown that adultery is a very great crime, once capital, now punishable like most other felonies: Stat. Revis. 1650, tit. Capital Laws, sec. 8, ed. 1808, p. 42, n.; Revis. 1821, tit. 22, sec. 62. And an attempt to commit, or a solicitation of another to commit such a crime, must be at least a high crime and misdemeanor; and we have already said that a high crime and misdemeanor is nearly allied and equal in guilt to felony: *State v. Knapp*, 6 Conn. 415; whereof the superior court has cognizance, by statute and by common law: Stat. tit. 22, sec. 98; *State v. Danforth*, 3 Conn. 112.

In *Rex v. Higgins*, 2 East, 5, the defendant was indicted for soliciting and enticing a servant to steal the goods of his master, and the defendant contended that as nothing was done, no crime was committed. The judges delivered their opinions *seriatim*, and unanimously pronounced it an indictable offense. "A solicitation or inciting of another," said Le Blanc, J., "by whatever means it is attempted, is an act done; and that such an act done with criminal intent is punishable by indictment, has been clearly established by the several cases referred to." "All such acts or attempts," said Lawrence, J., "as tend to

the prejudice of the community, are indictable. Then the question is whether an attempt to incite another to steal is not prejudicial to the community, of which there can be no doubt." As to the offense itself, it must be admitted that an attempt to commit a felony is in many cases at least a misdemeanor. In proof of this we may instance the common cases of an attempt to rob or to ravish, which are indictable offenses in every day's practice. But further, an attempt to commit even a misdemeanor has been shown, in many cases, to be itself a misdemeanor. I close this topic in the language of Lord Kenyon, C. J., which, *mutato nomine*, is *ad idem*. The offense is of the most serious kind, no less than that for his own wicked gratification he solicited and invited a woman to commit adultery, and can it be a question in a country professing to have laws subservient to justice and morality, whether this be an offense? But it is argued that a mere intent to commit evil is not indictable without an act done; but is there not an act done when it is charged that the defendant solicited another to commit adultery? The solicitation is an act; and God forbid that it should not be considered as an offense.

I am of opinion that the information is sufficient, and advise that the motion in arrest be overruled.

The other judges were of the same opinion, except BRAINARD, J., who was absent.

Information sufficient.

WYLIE v. LEWIS.

[7 Conn. 301.]

BLANK INDORSEMENT BY ONE PERSON OF PROMISSORY NOTE OF ANOTHER, payable to a third person, or order, does not import a valuable consideration from the payee to the indorser, nor imply an engagement by the indorser that the maker was of ability to pay, and would pay such note.

ASSUMPSIT brought by Moses Wylie, as executor of John Wylie. The declaration stated that Tucker made his note payable to plaintiff's testator, or order, on demand, with interest, for value received; that on the same day, the defendant, by his indorsement of said note for value received of John Wylie, promised and engaged that Tucker then was of ability to pay, and should pay said note according to its tenor; that Tucker then was, and has ever since been, bankrupt, which has been at all times known to the defendant; that nothing has been, or

could be, collected on the note; and that the defendant has not performed his promise.

On the trial, the plaintiff proved the execution of the note by Tucker, and the indorsement in blank by the defendant, and then claimed to have proved all the other facts alleged in the declaration. It was admitted that no demand was made on the maker, and no notice of non-payment given to the defendant. The defendant asked the judge to instruct the jury that the law did not imply such a consideration or contract as was stated in the declaration. But the judge instructed the jury that the law did imply such a contract and consideration, and that if they should find that Tucker was bankrupt when the note fell due, the holder was excused from making demand, giving notice, or bringing suit against the maker. The jury found for the plaintiff, and the defendant moved for a new trial.

Goddard, in support of the motion, contended: 1. That the note in question being payable to order, was subject, in relation to demand and notice, to the law of negotiable paper; 2. If this is a special contract, it must be sued on as a joint and several undertaking: *Josselyn v. Ames*, 3 Mass. 274; *Hunt v. Adams*, 5 Id. 358 [4 Am. Dec. 68]; *White v. Howland*, 9 Id. 314 [6 Am. Dec. 71]; 3. At any rate, the consideration must be stated and proved, as no consideration is implied: *Rann v. Hughes*, 7 T. R. 350; Rob. Frauds, 7; *Fell on Guaranty*, 7, 8; *Ballard v. Walker*, 3 Johns. Cas. 60.

Judson, contra, contended: 1. That a blank indorsement imports a valuable consideration: *Swift Ev.* 339; 1 *Swift's Dig.* 429; *Mandeville v. Welch*, 5 Wheat. 277; 2. That a blank indorsement imports that the maker shall be of ability to pay: *Swift Ev.* 342; *Bradley v. Phelps*, 2 Root, 325; 1 *Swift's Dig.* 434; *Wellon v. Scott*, 4 Conn. 527; *Prentiss v. Danielson*, 5 Id. 175, 179 [13 Am. Dec. 52]; 3. Due diligence was exercised in this case, because the maker was utterly insolvent: *Swift Ev.* 342; *Prentiss v. Danielson*, 5 Conn. 179 [13 Am. Dec. 52]; 4. That a negotiable note, not indorsed by the promisee, stands on the same footing as a non-negotiable note: 1 *Swift's Dig.* 430.

PETERS, J. The contract of an indorsement on a promissory note, whether negotiable or not, is too well understood to require arguments to explain its meaning, or authorities to enforce its obligation. It is always a collateral undertaking that the indorser will pay if the maker do not, provided the holder use

due diligence, demanding payment of the maker, in one case, attaching his person or property, in the other, and in both giving reasonable notice of the failure to the indorser: 1 Swift's Dig. 435. In one case we are governed by the English decisions under the statute of Anne, which we have recently adopted, and in the other by our own common law. In the case before us the note is negotiable, on which the defendant, at the time of its execution, placed his name in blank, but was neither promisee nor indorsee, and, therefore, not indorser. *Cui bono?* To what end? This does not appear. The plaintiff counted on this indorsement as if it contained an express written contract, subscribed by the defendant; and the question now is, does this blank support an averment?

A special contract must, in all cases, be precisely laid and strictly proved; for a variance is fatal. But such a contract is never implied. The legal import of this indorsement is an absolute engagement to pay, at all events; though it might have been explained or varied by parol, according to the original agreement of the parties: *Beckwith et al. v. Angell*, 6 Conn. 315; *Mitchell v. Culver*, 7 Cowen, 336; 3 Kent's Com. 68; *Sumner v. Gay*, 4 Pick. 310; *Tenny v. Prince*, 4 Pick. 385 [16 Am. Dec. 347]

But whether it imports an absolute or a conditional engagement, it certainly does not imply the consideration and contract stated in the declaration. An implied contract is where certain facts are proved, from which the law *ex æquo et bono* raises a promise, or rather enables the jury to find one. But in the case before us, the law is made not only to raise an express promise, but a written one, and it might have been added with equal propriety, a sealed instrument. This, certainly, is a novelty in pleading; an "*avis rara in terris nigroque simillima cygno*."

I advise a new trial.

LANMAN and DAGGETT, JJ., were of the same opinion.

HOSMER, C. J., dissented.

BRAINARD, J., absent.

New trial to be granted.

In *Perkins v. Catlin*, 11 Conn. 221, the court quote from this decision the statement that "the legal import of this indorsement is an absolute engagement to pay at all events," and say that it is a mere *obiter dictum*, unnecessary for the decision of the case.

PITKIN v. PITKIN.

[7 CONN. 307.]

LIABILITY OF A TESTATOR'S ESTATE FOR DEBTS OF PARTNERSHIP CONTINUED AFTER HIS DEATH.—Where a testator, by his will, directs that a partnership, of which he was a member, should be continued after his death, and the profits at the end of a specified time distributed among his devisees, the creditors of the partnership have no lien on the general assets of the estate of the deceased in the hands of his devisees.

REMEDY OF SUCH CREDITORS is by claim against the executor, to be pursued like other general claims against the testator's estate, and not in chancery.

BILL in chancery by Samuel Pitkin against Joseph Pitkin and others. In 1817, Samuel Pitkin, the plaintiff, Stephen Pitkin, and Joseph Pitkin were partners. In that year Stephen Pitkin made and published his last will, appointing Joseph Pitkin his executor. By this will he ordered that all his interest in the partnership business should be continued therein for four years after his death, and that at the expiration of that time, or on the dissolution of the concern, the same, with the profits that might arise thereon, and all his other estate, should be distributed among certain devisees named in the will. Stephen Pitkin died a few days after, and Joseph Pitkin became his executor, and carried on the partnership business with the plaintiff for four years. In 1818, the executor, after giving notice to creditors to present their claims within six months, the period fixed by the court, proceeded to settle the estate, without reference to the partnership fund, and caused a distribution to be made according to the provisions of the will. When Stephen Pitkin died, the partnership owed sundry persons, and some of the debts were not paid until after the lapse of the time limited for exhibiting claims against his estate. No settlement of the accounts of the partnership, which proved a losing concern, was made during the four years. At the commencement of this suit a large sum was due from Stephen Pitkin's estate to the company, over and above his share of the partnership property. The company owed the plaintiff four thousand dollars, a large part of which he claimed the estate should pay him. Joseph Pitkin had assigned his property, and left the state without settling the partnership accounts. The plaintiff claimed that he had paid part, and would be obliged to pay the rest of the company's debts. The bill prayed for adjustment of the partnership accounts, and a sale of so much of the testator's real estate as should be necessary to pay the plaintiff's demands and the testator's proportion of the partnership debts.

The parties joined in a demurrer to the bill, which the court adjudged to be insufficient, and the case was brought before this court by motion in error.

Sherman, for the plaintiff in error, contended: 1. That the estate of Stephen Pitkin was liable for the debts of the partnership during the four years of its continuance after his death, and cited and commented upon the case of *Ex parte Garland*, 10 Ves. 110; 2. That this is a case of which a court of chancery has jurisdiction, and cited to this point *Booth v. Starr*, 5 Day, 419.

Ellsworth and Toucey, contra, contended: 1. That the plaintiff had no equity. That the partnership was dissolved by the death of Stephen Pitkin. Only that part of a testator's estate which he directs to be employed in trade after his death will be subject to the fortunes of that trade: *Ex parte Garland*, 10 Ves. 110; *Ex parte Richardson*, 3 Mad. 138; 2. That the plaintiff's remedy, if he has any, is not in chancery.

HOSMER, C. J. To the determination below it is made an objection that the relief requested should have been granted, inasmuch as the general assets of the deceased are liable to the plaintiff. On the other hand, it has been insisted that the plaintiff has no claim on the general assets, but that his only remedy is against the executor of the deceased.

1. In respect to the first point for consideration, that is, whether the general assets of the testator are liable to the plaintiff, the case has been argued for him on the principle that although the devisees, strictly speaking, are not partners, yet that an interest in the profits of the trade subjects the estate in their hands to a lien in favor of the partnership creditors, and of the plaintiff as if they were partners.

To this argument the answer is direct and obvious. If the devisees are partners, they are suable in that capacity, and are to be treated in all respects as if they sustained that character. This at once terminates the specific relief requested on the estate in their hands.

But that they are not partners is indisputably clear. The principle that he who enjoys a part of the profits of a partnership is liable to the creditors of the firm, although unquestionable as a general rule, yet like other general rules, is limited by the reason on which it is founded. By operation of law, in respect of creditors, a person who is not a partner in fact, but who is benefited by the profits of a partnership, is clothed with that

character when he takes from them a part of that fund on which they placed reliance for the payment of their debts. Were it otherwise, the partnership creditors would be injured, and the person alluded to would receive usurious interest for his capital without its being attended with any risk: *Waugh v. Carver*, 2 H. Bl. 235, 246; *Grace v. Smith*, 2 W. Bla. 998, 1000; *Cooper et al. v. Eyre et al.*, 1 H. Bl. 37, 43; *McIver et al. v. Humble et al.*, 16 East, 169, 174; *Cheap v. Cramond*, 4 Barn. & Ald. 670; Gow. on Part. 6, 13, 15; Chit. on Cont. 68. But all this is inapplicable to the present case. In this case the capital is at hazard, and therefore the reasons derived from the possibility of usury do not apply; and as to the diminution of the fund to the disadvantage of the creditors, this is impossible. The devisees under the will are entitled to neither capital nor profits until the dissolution of the partnership. The company concerns must first be attended to, and after the extinguishment of all the debts and expenses, the devisees are to come in for their share of the net surplus, and not before.

Hence, the inapplicability of the principle advanced to this case, under its peculiar circumstances, is perfectly clear; the devisees are in no respect partners or *quasi* partners; nor from this source is there any ground to infer a lien upon the general assets of the deceased. I think it equally obvious that if there were a lien in favor of partnership creditors, it would not extend to the claim of the plaintiff. He trusted the partners personally and the fund, but with open eyes and full knowledge of all the facts, he did not credit the devisees, nor the estate devised, nor has he any claim upon the latter, unless on another principle, which will now be considered.

2. Are the general assets of the deceased liable to the plaintiff's demand by virtue of the testator's last will? By the devise they are not specifically pledged. The question then arises, whether by operation of law, on a true construction of that instrument, they are made liable to the claim advanced. I take it to be established law that they are not.

The case of *Hankey v. Hammond*, 1 Cooke B. L. 67, would seem to lend some aid to the principle advanced by the plaintiff; but this case, the first comprising the doctrines contended for by the plaintiff, was overruled by Lord Eldon in that of *Ex parte Garland*, 10 Ves. jun. 110. This determination, in the most lucid and able manner, establishes the doctrine that under the bankruptcy of an executor or trustee, directed by the last will of the testator, to carry on a trade, and a limited sum to

be paid by the trustees of his estate for that purpose, the general assets beyond that fund are not liable: 1 Madd. Ch. 504. In this case it was decided that the executor was to continue the partnership for four years, on the fund already invested, and beyond this, that there existed no liability on the general assets.

The principles on which the case *Ex parte Garland* is founded, are expressed by Lord Eldon at considerable length, and with great force. I do not mean to recite them; but in a concise form shall refer to those which, in my opinion, are most material.

To hold the general assets to be liable would be attended with great inconvenience. It would prevent their distribution for a long period, or disturb a distribution already made. The condition of the executor, it is true, may be attended with considerable hardship, as he becomes liable to the creditors, in his person, to the extent of all his property: *Wightman v. Townsend*, 1 Mau. & Selw. 412.¹ But in this condition he voluntarily places himself, in the free exercise of his judgment, and on full knowledge of the facts, adventures to assume this sort of responsibility.

In respect of the creditors of the partnership, they are divisible into two classes: those who were such before the testator's death, and those who became such afterwards. With respect to the first class of creditors, they have the power and means of calling forth, after the testator's death, the whole of his property, in discharge of their demands; and this is all the security they can wish. And in regard to those comprising the second class, who became creditors subsequent to the testator's death; in the first place, they may determine whether they will be creditors; in the next place, they have the whole fund embarked in trade to look to. Superadded to this they have the personal responsibility of the individual with whom they deal, the only security in ordinary transactions of debtor and creditor.

It is, therefore, manifestly less inconvenient to say that those who deal with the executor, must take notice that the testator's responsibility is limited by the authority given to the executor, than to assert, as the executor is authorized to carry on the trade, that all the other objects of the will must, at any distance of time, stand still, or that eventually they may be subjected to the claims of the partnership creditors.

On these principles, it was concluded by Lord Eldon that it would be unjust to consider the creditors of the company as

1. *Wightman v. Townsend*, 1 Mau. & Sel. 412.

having a lien on the testator's general assets; and as a precedent, extremely inconvenient to the interests of mankind.

As the creditors of the partnership have no claim on the general assets of the deceased, with much less force of argument can a claim be maintained in favor of the plaintiff.

On the death of the testator, the partnership was by law dissolved; *Gow* on Part. 269; *Griswold v. Waddington*, 15 Johns. 57, 82; S. C. in error, 16 Johns. 438, 490; *White v. Union Insurance Co.*, 1 Nott & McCord 559 [9 Am. Dec. 726]. With open eyes on this fact, and with full knowledge of his responsibility and of his legal claims on Joseph Pitkin only, the plaintiff thought proper to go on and incur the further hazard of the partnership. He knew (for he must be presumed to know the law) that Joseph Pitkin was substituted a partner for the deceased, and that the fund employed in the partnership was, in addition to his responsibility, his only resource. With respect to the indebtedness of the deceased, if he was indebted at the time of his death, the plaintiff, after payment, might have contribution from the deceased's estate, by a claim made on his executor. But even in support of such a demand, no ground is laid in the bill. It is only averred that the company at the death of Stephen Pitkin was indebted to various persons, in what sum is not mentioned; and that the plaintiff has been obliged to pay a part of the debts of the partnership, without stating to what amount. It is perfectly compatible with all the allegations made in the bill, that at the death of the testator, the partnership was indebted a dollar only; that the funds in the plaintiff's possession comprised many hundreds; and that the only debts paid by him amounted to an inconsiderable sum, and have been paid out of the partnership funds.

3. It is scarcely necessary to observe that the plaintiff's remedy, if one exists, is not by an application in chancery, to subject the testator's general assets; but it is by a demand on the executor of Stephen Pitkin. He is obliged by law, to the extent of all the deceased's estate, to satisfy every debt against it. All the debts of a deceased person constitute demands on his executor. Were there a specific lien, either on a part or on all the testator's property, it might be enforced by an appropriate suit; but here there is none. The claim, if any, is of a general nature, and to be instituted, as other claims are, against the executor of Stephen Pitkin.

The court, then, has come to this result; that the general assets of the deceased are not liable to the plaintiff's claim in

any other sense than that they are responsible eventually to all his creditors, through the medium of a demand made on his executor. Of consequence, in the judgment of the court below there is no error.

PETERS, DAGGETT, and BISSELL, JJ., were of the same opinion, the former suggesting some doubts.

WILLIAMS, J., gave no opinion, having been of counsel in the cause.

Judgment affirmed.

Cited in the following cases, to the point that the settlement of all matters pertaining to estates of deceased persons belongs to the court of probate: *Beach v. Norton*, 9 Conn. 196; *Cowles v. Whitman*, 10 Id. 126; *Ashmead's appeal*, 27 Id. 248; *Brush v. Button*, 36 Id. 294. In *Way v. Way*, 42 Id. 53, to show that probate courts alone have jurisdiction of assignment of dower. In *Filley v. Phelps*, 18 Id. 301, to show that the death of one partner dissolves the partnership. And in *Tillotson v. Tillotson*, 34 Id. 335, as an illustration of a case in which a testator by his will provides that his business shall be carried on for a certain time before distribution is made.

NORTON v. PETTIBONE.

[7 Conn. 319.]

DEFECTS IN LEVY OF EXECUTIONS ON REAL ESTATE may be cured by acts of the legislature, passed subsequent to the making of the levy.

DECLARATIONS OF PERSON WHILE IN POSSESSION OF LAND, against his own title, are admissible against him, and all persons claiming under him.

EJECTMENT for four pieces of land. The plaintiff claimed title by virtue of the levy of an execution in his favor against Alva Marks, who was the owner in fee of the piece of land first described in the declaration, and who was the owner of a one-half interest in the other three pieces, as tenant in common with others. A copy of the execution, with the return of the officer thereon, was offered in evidence, and was objected to on the ground that the return was defective in certain respects. The alleged defects were cured by an act of the legislature passed in May, 1825, after the making of the levy. The judge overruled the objections, and admitted the evidence. The defendants claimed title under Alexander Pettibone, whose title was by deed from Zechariah Marks, who derived his title from Alva Marks, the debtor in the above-mentioned execution. The plaintiff insisted that the deed from Alva to Zechariah Marks was made to defraud the former's creditors, and was, therefore, void. In support of this claim he offered a witness to prove

that Zechariah Marks, after the execution of the deed to him, while in actual possession of the premises, and previous to the deed to Alexander Pettibone, had acknowledged to him that the deed from Alva Marks to him was made to defraud the creditors of the grantor. The defendants objected to the admission of this evidence, but the judge admitted it, and the jury found for the plaintiffs. The defendants moved for a new trial.

Griswold, in support of the motion, contended: 1. That the officer's return was inadmissible as evidence; 2. That the declaration of a person not a party to the suit ought not to be admitted in evidence: *Duckham v. Wallis*, 5 Esp. 251; *Kent v. Lowen*, 1 Camp. 177; *Appleton v. Boyd*, 7 Mass. 131; *Barrett v. French*, 1 Conn. 354, 365 [6 Am. Dec. 241]; *Hatch v. Straight*, 3 Id. 31 [8 Am. Dec. 152]; *Cook v. Swan*, 5 Id. 140.

Ellsworth and Toucey, *contra*, contended: 1. That the return, if defective, was cured by the confirming act of 1825: *Mather v. Chapman*, 6 Conn. 54; 2. That the declarations of Marks while in possession, against his interest, were admissible against the defendants holding under him: *Beers v. Hawley*, 2 Conn. 467, 472, 473.

DAGGERT, J. On looking into the act of the general assembly passed in May, 1825 (subsequent to this levy), to confirm levies of execution on real estate, it is found that the defect in the levy, if it be one, is cured by that act. That this act is constitutional, and therefore of binding authority, was expressly decided by this court in the case of *Mather v. Chapman et al.*, 6 Conn. 54. The objection is therefore properly abandoned by the counsel, upon its appearing that the defect was embraced and cured by the act in question.

Another objection, however, is made, which will now be considered. This relates to the declarations of Zechariah Marks, which were admitted on the trial. That such declarations, so made, are admissible, I had supposed to have been too long and too well settled to be doubted. It has been so ruled more than twenty times within the last forty years. Declarations of a person while in possession of the premises, against his title, are always admissible, not only against him, but against those who claim under him. To this point the following cases are express: *Walker v. Broadstock*, 1 Esp. 458; *Davis v. Pierce et al.*, 2 T. R. 53; *Waring v. Warren*, 1 Johns. 340, 343; *Jackson d. Griswold v. Bard*, 4 Johns. 230 [4 Am. Dec. 267]; *Jackson d.*

McDonald v. McCall, 10 Johns. 377 [6 Am. Dec. 343]. In *Beers et al. v. Hawley*, 2 Conn. 467, this point was considered, that the whole court of errors concurred in the admissibility of the evidence. Three members of the court gave their opinion *seriatim*, Judges Swift, Hosmer, and Gould, and all recognized, in direct terms, this doctrine. The latter says: "The declarations of a former proprietor against himself, have always been admitted against those who claim under him:" p. 472-3.

The motion, therefore, must be refused.

The other judges were of the same opinion, except Williams, J., who gave no opinion, having been of counsel in the cause. New trial not to be granted.

Cited in the following cases to the point that the declarations of a deceased person, while in possession, against his own title, are admissible against all persons claiming under him: *Fitch v. Chapman*, 10 Conn. 12; *Deming v. Carrington*, 12 Id. 4; *Newell v. Roberts*, 13 Id. 71; *Smith v. Martin*, 17 Id. 401; *Ramsbottom v. Phelps*, 18 Id. 235. In *Savings Bank v. Allen*, 28 Id. 102, this case is cited as following *Goshen v. Stonington*, 10 Am. Dec. 121, on the point that when a statute is expressly retroactive, and its object is to correct an innocent mistake, it will be sustained. And in *Booth v. Booth*, 7 Id. 365, as recognizing the principle of previous decisions sustaining the constitutionality of the confirmatory act of May, 1826.

STATE OF CONNECTICUT v. LEACH.

[7 Conn. 452.]

PRISONER CONFINED IN JAIL UNDER VOID WARRANT may liberate himself by breaking the prison, provided he use no more force than is necessary to enable him to effect his liberation.

ESCAPE OF OTHER PRISONERS LAWFULLY CONFINED for atrocious crimes, in the same room with him, in consequence of his escape, does not render him guilty of any crime.

INFORMATION against Stoddard Leach in two counts. The first count charged that while he was a lawful prisoner in the common jail, confined with sundry other persons legally confined therein for having committed divers atrocious crimes and misdemeanors, he, with intent to effect his own escape, and for the purpose of effecting the escape of said other prisoners, did feloniously saw off the iron grates and bars to the windows of said jail, and remove large quantities of stone from the walls of said jail. The second count did not allege that he was confined in the jail, but charged him with having broken the prison with felonious intent, to enable the prisoners confined therein to

make their escape. The offense in each count was charged as a high crime and misdemeanor at common law.

On the trial, it was admitted that he in no other way attempted to effect the escape of other prisoners confined in the room with him, than as a consequence of the attempt to effect his own escape.

Defendant prayed the judge to instruct the jury that his imprisonment was illegal, and that he had a right to do the acts charged in the information. The judge instructed the jury that the warrant, by virtue of which the defendant was imprisoned, was illegal; yet, if they should find that he was confined in jail under such warrant, and did the other acts charged in the information, they should find him guilty. The jury accordingly found him guilty, and he moved for a new trial for a misdirection.

Chapman and Harrison, in support of the motion, contended:

1. That to convict a person of prison-breach, it must be averred and proved that the defendant was lawfully confined: Arch. Crim. Pl. 19, 22, 306; 1 Russell on Crimes, 547, 551, 555; 2 Swift's Syst. 373; 2. That as this information alleges a lawful imprisonment, it was necessary to prove such allegation: 2 Swift's Dig. 405; 1 Chit. C. L. 559; Arch. Cr. Pl. 19, 22; 3. That if the act of the defendant, in effecting his own escape, was lawful, he was not answerable for the consequences; that he was not bound to make any previous demand on the jailer to be liberated.

Smith and Edwards, contra, contended: 1. That the defendant, being confined under a process apparently regular and legal, could not forcibly break the prison, but he ought to have applied for a writ of habeas corpus, on which he might be discharged; 2. That he was liable to conviction on the second count, for letting out the other prisoners.

DAGGETT, J. It appears, from the motion, that the prisoner was confined in jail, and that he attempted to effect the escape of the other prisoners, in no other way or manner, than as a consequence of the attempt to effect his own escape. By this we are doubtless to understand that the only object of the prisoner was to free himself from confinement, and if, in effecting this object, persons legally imprisoned escaped, he disregarded such consequences.

The statute creating the offense with which the prisoner was charged, and for which he was committed, was repealed before

the acts alleged to be a crime were done; the complaint on which the warrant for his arrest issued, was illegal, not being made by an informing officer; and the court before which the prisoner was committed to appear had no jurisdiction of the crime charged.

I am of opinion that the direction to the jury was erroneous. The act of the prisoner in question was so far from being a high crime and misdemeanor, that it was justifiable. And here it is not intended to suggest, that a prisoner might not do acts which would be unjustifiable in order to escape from unlawful imprisonment. He might not, for example, kill the jailer, or set the prison on fire, or totally demolish it; for none of these acts might be at all necessary to effect his object. But he might lawfully free himself from this imprisonment, since it is confessed to have been illegal. It appears that all the proceedings were void. A void process is no process. The complainant, the justice of the peace who ordered him to be committed, the sheriff who executed the pretended warrant, and the jailer who held him under it, are all liable for false imprisonment. This is the undoubted doctrine of the common law from the time of the *Marshalsea case*, 10 Co. 68, to this day. It hence results, that the keeper of the jail is vested with no authority; the building in which the prisoner was confined is not a jail, but, as to him, a mere private building; and hence he might regain that liberty of which he was unjustly deprived; and it is no part of the case that he made use of more force than was necessary to accomplish this object. Nor does the fact that he was confined with certain atrocious offenders, render it less proper for him to effect his escape.

There must, therefore, be a new trial.

The other judges were of the same opinion; *PETERS, J.*, at first dissenting, but ultimately concurring.

New trial to be granted.

PERKINS v. PERKINS.

[7 Conn. 558.]

ALL LAWS ARE TO ACT PROSPECTIVELY, unless they are clearly expressed to be of retroactive effect.

DATE OF COMMENCEMENT OF ACTION.—An action is instituted by the service of the writ, and the officer's return of the service is *prima facie* evidence of the time of the commencement of the action.

PUBLIC ACTS OF THE GENERAL ASSEMBLY take effect from its rising, if not

otherwise provided; and courts take judicial notice of the time when the session of the legislature terminates.

WAIVER OF EXCEPTIONS TO JURISDICTION OF COURT.—When the want of jurisdiction arises from want of legal notice, appearance and submission of the party waive the exceptions to the jurisdiction; but when want of jurisdiction over the subject-matter appears from the record, the defect can not be supplied by the submission of the party.

ACTION of debt, by Francis A. Perkins, treasurer of the city of Norwich, against Joseph Perkins, to recover penalties incurred by breach of certain by-laws of said city. The writ was dated the twenty-seventh of May, 1828, served on the twenty-eighth, and returned to the city court of Norwich, held on the second Monday of June, 1828.

The first count of the declaration charged the defendant with having erected a building upon a part of a public street or highway of said city, in contravention of a by-law of the city, by which it was ordained that if any person should, without permission of the common council, erect or suffer to remain, in or upon any street or highway, any building of any kind, etc., the same should be a common nuisance, and the person so offending should pay to the use of the city the sum of thirty dollars. The second count charged him with a violation of another section of the same ordinance, prohibiting the laying or suffering to remain of any stone or stones upon any street or highway, and imposing a penalty of fifteen dollars for such offense.

The defendant pleaded *nil debet*, and on this issue the case was tried in the city court in August, 1828, when the plaintiff obtained a verdict on both counts, with thirty dollars damage on the first, and fifteen dollars on the second. On defendant's motion, the court caused a record to be made, that the title of the land on which the alleged nuisances were placed was in question on the trial; and the defendant thereupon appealed the cause to the superior court. In the superior court the plaintiff moved to strike it from the docket on the ground that it was not appealable. This motion was overruled, the case tried, and a verdict found for the defendant on the first count, and for the plaintiff on the second, with fifteen dollars damages.

Plaintiff then moved in arrest of judgment on the ground that the superior court had no jurisdiction of the cause, and that the same was not appealable from the city court. He alleged that the city charter provided that there should be no appeal from the city court in such actions as the present, and

that the act of the legislature giving an appeal to the superior court did not become a law until after the commencement of this suit. This motion being demurred to, was adjudged sufficient, and the judgment was arrested accordingly. The record was then, on motion of defendant, transmitted to this court for revision.

Strong and Hungerford, for the plaintiff in error, contended: 1. That the superior court had jurisdiction of the cause, and that it was appealable by virtue of the act of May, 1828; 2. That it does not appear from the record before the court that this suit was commenced before the act in question became a law; 3. That plaintiff had waived all exceptions to the jurisdiction by appearing and trying the case on its merits: Co. Lit. 303, a.; 1 Chit. Pl. 426; *Longueville v. Thistleworth*, 2 Ld. Raym. 969; *Jennings v. Hankyn*, Carth. 11; *Barrington v. Venables*, Sir T. Raym. 34; Com. Dig., tit. Abatement, J, 16, 21; 2 Lill. Prac. Reg. 121; *Denslow v. Moore*, 2 Day, 12; *Sanford v. Sanford*, 5 Id. 353, 358; *Fletcher v. Wells*, 6 Taunt. 191.

Goddard and Child, for the defendant in error, contended: 1. That the record shows when the suit was commenced, the officer's return being *prima facie* evidence of the facts stated in it: *Bulls v. Francis*, 4 Conn. 424; 2. That the act in question shows on its face when it became a law, which was a week after the commencement of this suit. But if it did not, the court is bound to take judicial notice of the time of the rising of the general assembly, which is the time when public statutes take effect: Stat. 258, tit. 43, sec. 5; *Birt v. Rothwell*, 1 Ld. Raym. 343; 1 Chit. Pl. 219; 3. That this act can not affect a suit commenced before, and pending at the time, the act was passed. A suit is not embraced in the terms of the act. If the act be not exclusively prospective in its terms, still the court will not give it a retrospective effect by construction: *Wilkinson v. Meyer*, 2 Ld. Raym. 1350; *Gillmore v. Shooter*, 2 Mod. 310; *Conch v. Jeffries*, 4 Burr. 2460; *Dash v. Van Kleeck*, 7 Johns. 477 [5 Am. Dec. 291]; *Ogden v. Blackledge*, 2 Cranch, 272; *Goshen v. Stonington*, 4 Conn. 225 [10 Am. Dec. 121]; 4. That if it appears from the face of the proceedings that the court did not have jurisdiction, the submission of a party will not give it jurisdiction: *Martin v. Commonwealth*, 1 Mass. 347; *Lawrence v. Smith*, 5 Id. 362; *Lockwood v. Knapp*, 4 Conn. 257.

HOSMER, C. J. Whether the suit in question was appealable, is the sole inquiry. If it was not, the superior court had no jurisdiction of the cause; and the judgment was legally arrested.

If the determination of the court below is to be tested by the charter of the city of Norwich alone, there arises no possible question. The provision is express, that in actions brought by the city treasurer for the recovery of a penalty arising under a by-law of the city, no appeal shall be allowed: Stat. 120. The defendant, however, claims a right of appeal by virtue of the act of the general assembly, passed in May, 1828; and this right must be conceded if the law is operative in this case. For by this act appeals are allowed to be made to the superior court, in actions brought to recover penalties for the breach of a city by-law, if, as in this case, the title of the defendant's land is in question.

The act alluded to, on the fairest principle of construction, authorizes appeals in cases posterior to the time of its legal commencement, and in no other. The expression of it is future and prospective: "Whenever an action shall be brought to recover a penalty," is its phraseology. Had the legislature intended it, it were easy and natural for them to have said, in all actions for penalties, appeals shall be allowed; and the only assignable reason why they did not is most obvious; they had no such intention. They made, and intended to make, provision for the future only; and permitted the past to remain under the dominion of the former law.

A construction of the act that should cause it to retrospect has been contended for, notwithstanding the expression of it is merely prospective and in relation to the future. But by this court, in the *Thames Manufacturing Company v. Lathrop et al.*, 7 Conn. 550, it was explicitly decided that an act of the general assembly ought not to have a retrospective operation, unless so declared in the most unequivocal manner. Such is the general strain of judicial decisions on this subject: 2 Inst. 292; 6 Bac. Abr. 370 (Gwil. ed.); *Helmore v. Suter et al.*, 2 Show. 17;¹ S. C., by the name of *Gillmore v. Executors of Shooter*, 2 Mod. 310; S. C., 1 Vent. 330; *Couch q. t. v. Jeffries*, 4 Burr. 2460; 1 Bl. Com. 44; *Wilkinson v. Meyer*, 2 Ld. Raym. 1350; *Ogden, administrator, v. Blackledge*, 2 Cranch, 272; *Dash v. Van Kleeck*, 7 Johns. 477 [5 Am. Dec. 291]. Hence it is said by Sir William Blackstone that all laws are to commence *in futuro* and operate prospectively: 1 Bl. Com. 46; and to this rule we have subjoined this exception, unless they are clearly expressed to be of retroactive effect.

Assuming, then, the act of May session, 1828, to be a pro-

1. *Helmore v. Suter*, 2 Show. 17.

spective regulation merely, it remains to inquire when was the plaintiff's action brought, and at what time did the law commence.

On the twenty-eighth of May, 1828, the plaintiff instituted his action by the service of his writ: *Spalding v. Butts et al.*, 6 Conn. 28. This is the date of the officer's return; and the return is *prima facie* evidence of the facts certified: *Bulls et al. v. Francis*, 4 Id. 424; *Booth v. Booth*, 7 Id. 350.

The act in question of May session, 1828, was signed and approved by the governor on the fourth day of the succeeding June, and could not have had an earlier commencement than this. By the constitution of the state, art. 4, sec. 12, every bill which shall have passed both houses of the general assembly must be presented to the governor, and if he approves, he is to sign it and transmit it to the secretary. Then, and not before, it becomes a law. On the fourth of June, 1828, the act was signed and approved.

On a principle of common law the court judicially knew the time when the legislature terminated its session. The commencement and close of the general assembly and other facts of the same public and general nature are of judicial cognizance: 1 Chit. Pl. 219; *Birt q. t. v. Rothwell*, 1 Ld. Raym. 210, 243; *Eliz. Shipden's case v. Dr. Redman*, 1 Lev. 296; *Bishop of Norwich's case*, Moore, 551; Bac. Abr., tit. Statute, L. 5. And at least, it is an indisputable fact that the session of May, 1828, did not terminate before the fourth day of June before mentioned. It is a statute provision that all public acts of the general assembly take effect from its rising, unless it is otherwise provided: Stat. 558, tit. 43, s. 5.

From the premises it necessarily results that the general assembly terminated its session on the fourth of June, 1828, and that the plaintiff's action was commenced six days before; that is, the twenty-eighth of May. The act in question, then, is inapplicable to this case, and it is affected by the charter of the city alone, which inhibits an appeal.

It was suggested in the argument that the want of jurisdiction can not now be taken advantage of, on the ground that the parties, by proceeding to trial on the merits, have submitted to the jurisdiction. Undoubtedly it is true that where the court has a general jurisdiction over any subject, until the want of it is demonstrated by extrinsic facts, they must be duly pleaded. But where the jurisdiction of a court is limited (a legal truth in respect to all our courts), and the want of juris-

diction appears from the face of the record, the court not only may, but ought to dismiss the suit, at any time, and in any stage of it. The court, who are to decide according to law, are not concluded by the admission of the parties: *Bac. Abr.*, tit. Abatement, K; *Lockwood v. Knapp*, 4 Conn. 258; *Martin v. Commonwealth et al.*, 1 Mass. 347; *Lawrence v. Smith et al.*, 5 Id. 362.

I am of opinion that the superior court had not jurisdiction of the plaintiff's action, and that the arrest of judgment was correct.

PETERS, J. Several subordinate questions have been discussed in this case, which it is not necessary to decide or consider, as a decision of the principal one is final. Was this cause appealable, or within the jurisdiction of the superior court? If it was not, our labor is in vain; for a judgment *coram non judice* is a nullity.

By the charter of this city, which is a public law, in force when this action was commenced, the city court had cognizance of all causes (wherein the title of land was not concerned), cognizable by the county court, provided the cause of action arose, and one or both of the parties lived within the city; and in actions brought to the city court for penalties under the by-laws, no appeal was allowed: Stat. 112, 120, tit. 15, c. 1, sec. 8, 20. The defendant, however, claims that the act of the legislature, approved June 4, 1828, has enabled him to plead title, and make this cause appealable, and, of course, cognizable by the superior court. But this act was passed after the commencement of this suit, and it is in terms prospective. The words are: "Whenever any action shall be brought to recover a penalty for the erection or continuance of any nuisance upon any public highway, etc., and the defendant shall justify," etc.: Stat. vol. 2, p. 196-7. This certainly could not relate to actions already brought and then pending. And such has been the construction of a similar expression in the statute of frauds: 29 Car. II, c. 3, which enacts "that from and after the twenty-fourth of June, 1677, no action shall be brought to charge any person on any agreement made in consideration of marriage, unless such agreement be in writing." It was said by the court that it could not be presumed that the act had a retrospect to take away an action to which the plaintiff was then entitled: *Gillmore v. Shooter's Exr.*, 2 Mod. 310. So that we may safely leave the question whether the judiciary may declare a retrospective law, operating on vested rights, void, where the chief

justice has left it in *Goshen v. Stonington*, 4 Conn. 225 [10 Am. Dec. 121], and adopt the opinion of Mr. Justice Thompson, in *Dash v. Van Kleeck*, 7 Johns. 477, 493, *et seq.* [5 Am. Dec. 291], that a law ought not to have a retrospective operation, unless so declared in the most unequivocal manner. A similar opinion was expressed by this court in *Goshen v. Stonington*, 4 Conn. 222-3: "A statute is not to be construed as having a retrospect. Such a construction ought never to be given, unless the expression of the law imperiously requires it."

I dissented from the opinion of the court in the case last cited, but not on this point. I then thought, and still think, that a retrospective statute (it is not a law), affecting vested rights, is utterly void; and that the judiciary, not only may, but must declare it so. So thought Chief Justice Kent, in *Dash v. Van Kleeck*. The marginal summary is: "It is a principle of universal jurisprudence that laws, civil or criminal, must be prospective, and can not have a retroactive effect." So thought Mr. Justice Story, in *The Society for the Propagation of the Gospel, etc., v. Wheeler et al.*, 2 Gal. 105. So thought the supreme court of the United States, in *Ogden v. Blackledge*, 2 Cranch, 272, who considered the point too plain for argument, and said that a statute could not retrospect, so as to take away a vested right. And so said the court of king's bench, in *Couch q. t. v. Jeffries*, 4 Burr. 2460, wherein the question was, whether a statute passed after the commencement of a suit could affect such suit; and they unanimously determined it could not. "It can never be the construction of this act," said Lord Mansfield, "to take away this vested right, and punish the innocent pursuer of it with costs." But I forbear. This court have repeatedly decided otherwise, and I submit: *Vide, Hills v. Thrall*, in this court, in 1801; *Goshen v. Stonington*, 4 Conn. 209; *Mather v. Chapman*, 6 Id. 54.

But it is said that there is no evidence that the suit was commenced before the passage of the statute in question. It appears by the sheriff's return, which is a part of the record, that the process was served May 28th, and that the statute authorizing an appeal was approved June 4, 1828. It is a well-settled rule that the return of an officer is *prima facie* evidence of the facts therein stated. This statute is a public law, whereof we are bound to take notice: *Butts et al. v. Francis*, 4 Conn. 424; *Slayton v. Chester*, 4 Mass. 478; 1 Bl. Com. 85.

It is also said, that the appearance of the plaintiff after the appeal, and submitting to the jurisdiction of the court by pro-

ceeding to trial on the merits, are equivalent to a waiver of all exceptions to the appeal and to the jurisdiction of the court; and so is the law, when the want of jurisdiction arises from the want of legal notice. But when the want of jurisdiction appears of record, the defect can not be supplied by the submission of the party; for the agreement of the parties can not alter the law, nor make that good which the law makes void: *Aldrich v. Kinney*, 4 Conn. 380 [10 Am. Dec. 151]; *Mitchell v. Kirtland*, 7 Conn. 229, and the authorities there cited.

I am, therefore, of opinion that there is no error in the judgment complained of.

The other judges were of the same opinion.

Judgment affirmed.

Cited in *Brewster v. McCall's Devises*, 15 Conn. 290; and in *Plumb v. Sawyer*, 21 Id. 155; to the point that statutes are not to be construed retrospectively, unless by express terms, or otherwise, it appears to have been the manifest intent of the legislature to make them retroactive. In *Hine v. Belden*, 27 Id. 392, and in *Skinner v. Watson*, 25 Id. 126, to show that it was owing to the form of the language used in the statute construed in the principal case, that the court refused to give it a retrospective construction. In *Raymond v. Bell*, 18 Id. 89, to show that it must appear in this country, in all courts, that they have jurisdiction of the person and cause. And in *Woodruff v. Bacon*, 34 Id. 182, to show that if want of jurisdiction appears from the record, the admissions of the party can not confer jurisdiction on the court.

In *Dash v. Van Kleeck*, 5 Am. Dec. 291, held that a statute should, if possible, be so construed as to deprive it of any retrospective effect interfering with vested rights. On this subject, see note to this case, p. 315; and note to *Gooken v. Stonington*, 10 Am. Dec. 121, 131. And to the same point, see *Lewis v. Brackenridge*, 12 Id. 228.

COMMENCEMENT OF SUIT.—The issuing of the writ is the commencement of the action: *Ross v. Luther*, 15 Id. 341, and note, 344.

Consent of parties can not confer jurisdiction where it is denied by law: *Bent's Executor v. Graves*, 15 Id. 632.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

MITCHELL v. MERRILL.

[2 BLACKFORD, 87.]

TENDER OF PERSONAL PROPERTY at the time and place of delivery may be pleaded in bar to an action on a bond for such delivery, without averring readiness afterwards to deliver it, or to bring it into court.

THE DECLARATION ON SUCH BOND need not allege demand at the place stipulated for delivery.

A TENDER AND REFUSAL OF PERSONAL PROPERTY, or what is equivalent thereto, vests the property in the creditor, and puts an end to his right to sue on the contract.

ERROR to the circuit court. Covenant, brought by Merrill against Mitchell and others. The opinion states the case.

Nelson, for the plaintiffs.

Payne, *contra*.

BLACKFORD, J. This was an action of covenant, founded on a writing obligatory to the following effect: The obligors bound themselves to the plaintiff in the penal sum of one hundred and ninety-seven dollars, conditioned for the delivery of certain horses, to the sheriff of Harrison county, on a certain day, at the house of Jordan Vigus, in Corydon. The plaintiff avers in his declaration that the defendants have not performed their covenant, nor has either of them; that the horses became due at the time specified in the obligation, are still due, and not delivered to the plaintiffs, nor to the sheriff, as aforesaid, contrary to the covenant; that the defendants, though often requested, have not, nor has either of them, before, at the time, or since the horses became deliverable, delivered the same or

any of them to the plaintiff, nor to the sheriff, nor to any person for them or for either of them; but that they have hitherto wholly neglected and refused, and still do neglect and refuse so to do. To the damage of the plaintiff, three hundred dollars. The defendants craved oyer of the writing obligatory, and demurred generally to the declaration. The circuit court decided in favor of the plaintiff.

The objection made to the declaration is, that it contains no averment of a demand of the horses at the place specified for their delivery by the condition of the bond. To show the deficiency of the declaration in this respect, the plaintiffs in error have referred us to *Sanderson v. Bowes*, 14 East, 500; *Rowe v. Young*, 2 Brod. & Bing. 165; and to the cases of *Gilly v. Springer*,¹ and *Palmer v. Hughes*,² in this court. The first and last cases mentioned were actions on promissory notes for the payment of money; the other was on an acceptance of a bill of exchange; all payable at a particular place. They are not, as we conceive, applicable to the cause we are considering. This action is founded on a bond with a penalty, conditioned for the delivery of property at a certain time and place. In *Sanderson v. Bowes*, and *Rowe v. Young*, the courts take particular care to distinguish the cases of debt upon penal bonds from those they were examining; and expressly admit that in the former no special demand was necessary to be averred. They say that a compliance with the condition of the bond, to avoid the penalty, or whatever is equivalent to a compliance, is matter of defense, and must be pleaded. It is true that the case before us is not an action of debt, but of covenant, and it may be thought that that makes a difference. Whether it does or not, would be a proper subject of inquiry, if this were a bond conditioned for the payment of money; but as it is not, that point needs not to be considered. There is another ground, independently of this being a bond with a condition, upon which this case is distinguishable from those referred to. It is this: Here the obligation is for the delivery of property, there the contracts were for the payment of money. This, we are of opinion, creates a wide difference between the cases. No cause ever underwent a more careful examination than that of *Rowe v. Young*. The twelve judges of England all delivered their opinions, the most of them at great length; so did Lords Eldon and Redesdale. The great question in the house of lords was, whether the plaintiff should, in his declaration, aver a demand at the place,

1. 1 Blackf. 267.

2. 1 Blackf. 328.

or whether it should be left to the defendant to plead a tender at the place, or something equivalent, and bring the money into court. That the defendant should not be driven to plead, was the final decision of the court upon this strong ground, that the plea of tender requires the bringing of the money into court; and, therefore, if the defendant be compelled to plead, he must transport his money to the court, however distant, though he may have always had it ready at the place where, and where only, he had promised to pay it. That was the consideration which settled the case of *Rowe v. Young*, making the averment of a demand at the place necessary, in actions on notes and acceptances for the payment of money; and that was the consideration which produced the decisions of this court, in *Gilly v. Springer*, and *Palmer v. Hughes*.

The case we are now considering is, as has been already observed, of a character altogether different from those which have been mentioned. It is founded on a contract for the delivery of property, not for the payment of money. In this case, a tender and refusal of the property at the time and place fixed upon for the delivery, or the defendants being at the time and place with the property ready to deliver it, and the plaintiff's not attending, nor any person for him, to receive it, constitute a complete plea in bar of the action, without the averment of a readiness at any time afterwards to deliver it, or of a bringing of it into court. By the tender and refusal, or that which is equivalent, the property becomes vested in the creditor, and his right to sue upon the contract is at an end: *Slingerland v. Morse*, 8 Johns. 474. The consequence of this doctrine is clear. The being afterwards ready, or the bringing of the property into court, not being essential to the plea of tender in a case of this kind, the foundation of the decisions referred to requiring the averment of a demand in the declaration, instead of leaving the defendant to his plea, fails entirely in the present case. Here the obligors bound themselves for the delivery of the horses at the house of Jordan Vigus, in Corydon, on a certain day. It was not material to them whether the obligee attended or not; their duty was to be at the place on the day, ready to deliver the property. If they neglected thus to attend, and did not comply with their obligation, they failed in their contract and are liable to an action. A demand by the obligee was not a precedent condition. It formed no part of the consideration of the bond. The obligors could have complied with their contract and they were bound to do so, whether the obligee, or any person for him, attended or not.

Had the defendants been ready, at the time and place, to deliver, and found no person there to receive, they could, in this action against them, have pleaded that fact in bar with as much effect and with as little inconvenience as they could an actual delivery, if there had been one.

From these considerations, we are of opinion that the declaration in this case is sufficient, without the averment of a demand at the particular place; and that the judgment of the circuit court, therefore, overruling the demurrer, was correct.

By COURT. The judgment is affirmed, with one per cent. damages and costs.

TENDER OF MONEY OR OF PERSONALTY.—See *Behaly v. Hatch*, 12 Am. Dec. 570, and note referring to other cases and notes in this series.

JAMISON v. HENDRICKS.

[2 BLACKFORD, 94.]

A SHERIFF WHO, under an execution, sells the property of a stranger to the writ, is liable in trover or trespass without demand.

A PURCHASER AT SUCH SALE, who exerts acts of ownership over the property bought, after learning that the property belongs to a stranger to the writ, is liable in trover without demand.

DAMAGES IN TROVER may be recovered for injury done to the goods as well as for their value.

APPEAL from the circuit court. Trover for a horse, brought by Hendricks. Plea, not guilty. Verdict and judgment for the plaintiff.

Nelson, for the appellant.

Fletcher, contra.

HOLMAN, J. Trover for a horse. The substance of the evidence, as set forth in a bill of exceptions, was, that Hendricks lent the horse to Davis, in Marion county, to ride to Corydon. The horse was taken in execution at Corydon, as the property of Davis, and sold, and Jamison became the purchaser. At the time of the levy, Davis proclaimed that the horse was not his, but belonged to Hendricks. Before the commencement of this suit, Jamison told one of the witnesses that when Hendricks came in search of his horse he was out at grass. After the commencement of the suit, Davis observed to Jamison that he did not pity him, for he had told him before that the horse was the property of Hendricks. One of the witnesses stated that

the horse was worth thirty dollars. The horse was purchased by Jamison in 1822, this action was commenced in 1825, and the trial was had in October, 1826.

The defendant moved the court to instruct the jury that it was necessary for the plaintiff to prove a tortious conversion, or a demand and refusal of the horse. The court gave that instruction. The defendant further requested the court to instruct the jury that to prove a conversion in this case it was necessary to prove a demand of the horse and a refusal to deliver him up; but the court instructed the jury that the using the horse as his own by the defendant, or exercising acts of ownership over him, was a conversion of the property. The jury found a verdict for the plaintiff for sixty-one dollars. The defendant moved for a new trial, which was refused by the court.

The point most relied on in this case arises out of the instruction of the court, that proof of a demand and refusal was unnecessary. This instruction of the court is to be taken in connection with the whole case as it stood before the jury. The officer, on an execution against Davis, had taken the property of Hendricks, notwithstanding the proclamation of Davis that the property was not his, and was liable to the action of Hendricks, either of trespass or trover, without a demand. Jamison, before he purchased the horse, was notified by Davis that the horse belonged to Hendricks. This notice, it is true, did not come from a source in which Jamison was bound to place full confidence, yet it was sufficient to put him upon his guard, and induce him to take care what he was purchasing. This taken in connection with the statement of Jamison, when Hendricks came for his horse and was prevented by some evasion from seeing or getting possession of him, he being kept out of the way, that the horse was "out at grass," presents a chain of circumstances sufficient to warrant this action without a regular demand and refusal, inasmuch as they show that Jamison must have been exercising acts of ownership over the horse after he had sufficient reason to believe that he was the property of Hendricks, and made use of evasive measures to prevent Hendricks from obtaining him. In the case of *Baldwin v. Cole*, 6 Mod. 212, it is said that the denial of goods to him who has a right to demand them, is an actual conversion. And in the case of *La Place v. Aupoix*, 1 Johns. Cas. 406, the defendant's admissions that he had the plaintiff's goods, and that they were lost, was held to be evidence of a conversion without proof of a demand and refusal. See, also, 3 Stark. Ev. 1496, and various

other authorities there cited, which lead to the conclusion that the jury in this case were authorized to find that the defendant had converted the horse to his own use.

The damages given by the jury are perhaps more than in strict justice ought to have been given; but as the defendant had been about four years in possession of the horse, and as the plaintiff is entitled to recover for the injury done to his goods, as well as for their value, 1 Stark. Ev. 199, in note, and the case there cited, we are not prepared to say that the damages are so conclusively excessive that the circuit court, in the exercise of a sound legal discretion, was bound to grant a new trial on that account.

By COURT. The judgment is affirmed, with one per cent. damages and costs.

DURHAM v. MUSSELMAN.

[2 BLACKFORD, 96.]

ONE SHOULD SO USE HIS OWN PROPERTY as not to injure the property of another. But it is only when one deviates, either by intention or neglect, from the ordinary use of his property, that he is liable for an injury done thereby to another.

WHERE AN ACT IS UNLAWFUL, the actor is liable for an injury done, without reference to the probability that it would occasion that particular injury.

WHERE AN ACT IS LAWFUL, the liability of the actor, for an injury occasioned by it, depends upon the question whether the injury was the natural or probable consequence of the act, or was merely accidental.

ERROR to the circuit court. The opinion states the case.

Sweetser, for the plaintiff.

Wick, *contra*.

HOLMAN, J. Durham, in his declaration against Musselman, charges in the first count that Musselman, on his uninclosed land in Johnson county, cut a large tree so that it was nearly ready and always liable to fall, and then built a fire around it, and negligently and unlawfully left it burning, and always liable to fall; which tree afterwards, on the same day, fell upon and killed the mare and colt of the plaintiff. In the second count he states that his mare and colt were running at large in the uninclosed lands in Johnson county, and that the defendant, knowing the same, but contriving maliciously to injure the plaintiff, unlawfully, carelessly, and negligently cut a large tree

in Johnson county, and then built a fire around said tree and left the same always liable to fall; which tree, by the said cutting and burning, afterwards, on the same day, fell upon and killed the said mare and colt. To this declaration the defendant demurred and had judgment.

The case seems to rest, in some measure, upon the peculiar customs of this country. It is well known that horses and cattle are permitted to run at large through the country, and particularly in the new settlements, in one of which this transaction took place, and are not considered as trespassing by entering the uninclosed lands of any person. So that the defendant cannot resist this action on the ground that the mare and colt of the plaintiff were trespassing on his lands when they were killed. Nor can the defendant sustain his defense, even on the first count in the declaration, on his supposed natural right of doing what he pleases on his own land; for a man should so use his own property as not to injure the property of another. But this principle of common justice does not render a man liable, as a matter of course, for every injury another may sustain from his use of his own property. It is only when he deviates, either by intention or neglect, from the ordinary use of his property that he can be considered liable for an injury thereby done to another. If the act was unlawful, as laying a log on a highway, he would be liable for an injury done thereby, without any reference to the probability that it would occasion that particular injury. But when the act is lawful the liability of the actor, for an injury occasioned by it, depends in the first place on the question whether the injury is the natural or probable consequence of the act, or is merely accidental. If the injury is the natural or probable consequence of the act, and such as any prudent man must have foreseen, it is but reasonable that the perpetrator of the act should be held accountable for the injurious consequences. As in the case of the man baiting his traps with flesh so near the highway, or the grounds of another, that dogs passing the highway or kept in another's grounds are attracted into his traps and thereby injured, he is liable for the injury: *Townsend v. Wathen*, 9 East. 277. In the second place, when the injury is accidental, the liability of the actor must depend on the degree of probability there was, that such an event would be produced by the act.

Testing this case, as it stands in the first count, by these rules, it is evident that the cutting or burning down of a tree on a man's own land, whether inclosed or otherwise, is not an

unlawful act. The charge in the declaration, that it was unlawfully done, amounts to nothing, where there are no circumstances to warrant such a charge. In removing the heavy forests with which our lands are covered we see it to be a very general practice to girdle the trees, and leave them to die and fall according to the course of nature. If the trees so girdled fall upon the cattle of others, running at large, the person who girdled the trees is not liable for the injury. Every person suffering his cattle to run at large through the forest must be considered as running the risk of their being killed by the trees so girdled. Another method used for the destruction of timber is to employ fire for the removing of such trees as are susceptible of being felled by burning. This practice, though not so common as the former, and perhaps more dangerous, is by no means unlawful. The destruction of the cattle of others is not the natural or probable consequence of such a practice. If cattle are thereby destroyed, it can only be considered as accidental; and the circumstances of the case would determine what degree of probability there was that such would be the consequence. The simple act of leaving a tree on fire, which must of necessity burn down in a short time, and which, in its fall, killed the plaintiff's mare and colt, is not such an act, under the existing state of things in this country, as would render the actor liable to the injured person. So that under the first count in the declaration the plaintiff cannot maintain his action.

The second count presents the case a little differently. It does not state that the tree was on the lands of the defendant, but in Johnson county. But as it is not suggested in the declaration, nor pretended in the argument, that the defendant had done any wrong, as it respected the tree itself, or was infringing the right of any person by molesting the tree, this difference in the two counts can make no difference in the defendant's liability. But this count states that the defendant, contriving maliciously to injure the plaintiff, cut the tree and set it on fire; but this can not materially alter the case. The averment of malice has no connection with the injury of which the plaintiff complains. Had the injury been the natural or probable consequence of the act, a malicious design might have been connected with it. But to connect a malicious design to injure with the burning of a tree in Johnson county, because the defendant knew that the plaintiff had a mare and colt running at large in Johnson county, seems to be forced and unnatural. We cannot have a definite idea of a design to injure

unconnected with some degree of probability that the means made use of would effect the design. Although the plaintiff's mare and colt were running at large in Johnson county, yet the probability of injuring either of them by burning down a tree in that county is so very remote that we can not connect it with the idea of design or contrivance. Many thousands of trees might have been left to burn down in that county on the same day, without injuring the plaintiff's mare or colt. In order to have given materiality to the charge of malice, the declaration should have shown that there was some degree of probability that the burning down of the tree would have done the plaintiff an injury; as, that the tree stood near, and would probably fall where the defendant knew the plaintiff's mare and colt were usually or frequently feeding, passing, or standing; and then the materiality of the charge of malice would depend on the degree of probability. Without showing some such probability of doing an injury, the charge of malice amounts to nothing. So that the action cannot be supported on either count in the declaration.

By COURT. The judgment is affirmed, with costs.

CUPPS v. IRVIN.

[2 BLACKFORD, 112.]

THE ASSIGNEE OF A BOND for the conveyance of a tract of land, for which the obligor holds a land-office certificate, may have his bill in equity to enjoin the assignee of the certificate with notice of complainant's rights, from disturbing complainant in his possession, and from selling to a purchaser without notice.

BILL in equity. The opinion states the case.

Nelson, for the appellant.

Naylor, *contra*.

BLACKFORD, J. This is a case in chancery. The material facts are as follows: Manson had a land-office certificate for a quarter-section of land. The date of the entry, or the amount paid, is not stated. He sold thirty acres of the land to Freeman, and gave him his bond for the making of a good title, in the year 1829. Freeman had possession of the land so purchased with the consent of Manson. After the execution of the title bond, Manson sold and assigned the certificate to Irvin, the defendant, without any reservation as to Freeman's claim,

informing the purchaser that that claim was conditionally assigned to him, Manson, and that he intended to discharge the land of it. Cupps, the complainant, is the assignee of Freeman, and he has reason to fear that Irvin will disturb his possession, and also sell and assign the certificate without notice to the purchaser of the complainant's claim. The bill prays that the defendant be decreed to execute an acknowledgment of the trust, and enjoined from disturbing the complainant's possession, and for general relief. The circuit court dismissed the bill, with costs.

In determining this case, it is not necessary to say what will be the extent of the complainant's claim when this title bond shall have become due. The defendant purchased with full notice of the bond, and the testimony shows that the complainant had good cause to apprehend that his possession will be disturbed; and, also, that the defendant will sell and assign the certificate to some person without notice of the bond. These facts, we conceive, are sufficient to entitle the complainant to a decree, restraining the defendant from assigning the certificate without notice, and from interrupting the complainant's possession. The decree of the circuit court, dismissing the complainant's bill, is accordingly reversed; and this court, proceeding to give such a decree as the circuit court ought to have given, do strictly enjoin the said Irvin from selling, leasing, mortgaging, or in any manner, or for any time, disposing of the said thirty acres of land particularly described in the title bond mentioned in the record of this case; and from assigning the certificate therefor in the record mentioned, without giving notice to the purchasee, lessee, mortgagee, assignee, or other person concerned as aforesaid, of the said title bond, whilst the same shall remain unsatisfied; and do also enjoin the said Irvin, and every person claiming or to claim by, through, or under him, from disturbing, or in any way interrupting, the possession of the said Cupps, his heirs and assigns, in the said thirty acres of land.

To be certified, etc. Decree for costs in this court.

EVILL v. CONWELL.

[2 BLACKFORD, 133.]

FORCIBLE ENTRY, WHAT IS.—Entry by night into a house from which another has removed, leaving a few articles therein, the house being fastened by nails over the latches, and putting a tenant into possession with directions to prevent any one from taking possession thereof, and the actual use of threats by such tenant towards persons sent by the one who had removed, constitute a forcible entry, or at least a forcible detainer.

ERROR to the circuit court. The opinion states the case.

Dunn, for the plaintiff.

Stevens and Lane, contra.

SCOTT, J. Luke Evill brought an action of forcible entry and detainer against Elias Conwell, before two justices of the peace of Dearborn county, and had a verdict and judgment in his favor; from which Conwell appealed to the Dearborn circuit court. The appeal, by consent of parties, was tried by the circuit court, without the intervention of a jury; and on that trial the judgment of the court was in favor of Conwell. To reverse that judgment is the object of the present writ of error.

The testimony, as set out in a bill of exceptions, is in substance as follows: On the premises in controversy there was a dwelling-house and garden, inclosed with a fence. On a Friday in March, 1825, Evill, the plaintiff in error, left the premises and moved his family and furniture into a house in the town of Aurora, leaving in the house some sash and a work-bench, and on the premises a quantity of brick, lime, some garden stuff, and a cow. The doors of the dwelling-house were shut and fastened with latches, and the latches secured with nails over them. In this situation the premises were seen on the Sunday evening after the plaintiff left them. On that night, after dark, and after witness had undressed for bed, he was called upon by the defendant to go with him to take possession of the premises; and, on Conwell's agreeing to see him harmless, the witness took his wife and bed and went to the house and found the outer door open, by which they entered; and Conwell delivered possession to the witness, and gave him a lease for three years, with instructions not to permit Evill, or any other person, to take possession of the place; and the witness has ever since that time occupied the premises as tenant under Conwell. A day or two afterwards persons sent by the plaintiff's directions were turned away by the tenant. One witness stated that while hunting his cattle for the purpose of hauling away the lime, at the plaintiff's re-

quest, from the said premises, and before he came to or near the place, he was met by Conwell, who, being informed of his design, forbade his going on the premises, and threatened to beat and prosecute any person who should go upon them; in consequence of which threatening the witness desisted. It was not proved that Conwell was ever afterwards on the premises.

In this case, the only doubtful point seems to be whether Conwell, in taking possession, made use of such force as to lay him liable to this action. There is nothing in the testimony before us amounting to positive proof that Conwell, in making his entry, used any actual violence. But we think the facts of his taking possession in the dead of night, and entering a house which was, in the evening, secured by having a nail over the latch; his directions to his agent to prevent all persons, and the plaintiff in particular, from getting possession, and his maintaining that possession with threats of personal violence, were, all taken together, sufficient to justify the circuit court in finding a forcible entry. But even if his entry by stealth, under the shade of night, was without force, our statute gives this remedy where the entry may have been peaceable, but the possession maintained with force and strong hand. The testimony in this case leaves no doubt of Conwell's maintaining his possession with threats and strong hand; his agent on the premises actually turned away persons who were sent there by Evill, and he himself threatened to beat any person who should go upon the land. For this reason we think the plaintiff was entitled to restitution.

By COURT. The judgment is reversed, with costs. Cause remanded, etc.

WHAT IS A FORCIBLE ENTRY.—Forcible entries were first brought to the notice of the courts of law as offenses against the public peace, and were punished by imprisonment. The offense was committed by violently taking possession of lands and tenements with menaces, force, and arms, and without the authority of law: 4 Bl. Com., sec. 148. Previous to the year 1381, A. D., entries of this nature were permitted to enable one to regain the possession of lands of which he had been disseised; but this privilege leading to much lawlessness, it was found necessary, in the year above mentioned, to abolish it. The early history of forcible entry is succinctly related by Mr. Justice Blackstone, in the fourth volume of his Commentaries, section 148, and is interesting as disclosing in the proceedings for its punishment, many features that are preserved, at this day, as essential to the common summary remedy for forcible entry and detainer. That author, after stating the fact that an entry by force and arms was formerly allowable "to every person disseised or turned out of possession, unless his entry was taken away or barred by his own neglect or other circumstances," continues: "But this being found very prejudicial to the public peace, it was thought necessary, by sev-

eral statutes, to restrain all persons from the use of such violent methods, even of doing themselves justice, and much more if they have no justice in their claim. So that the entry now allowed by law is a peaceable one; that forbidden is such as is carried on and maintained with force, with violence, and unusual weapons. By the statute, 5 Rich. II., st. 1, c. 7, all forcible entries are punished with imprisonment and ransom at the king's will. And by the several statutes of 15 Rich. II., c. 2; 8 Hen. VI., c. 9; 31 Eliz., c. 11; and 21 Jac. I., c. 15, upon any forcible entry or detainer, after peaceable entry, into any lands or benefices of the church, one or more justices of the peace, taking sufficient power of the country, may go to the place, and there record the force upon his own view, as in case of riots, and upon such conviction may commit the offender to jail till he makes fine and ransom to the king. And moreover, the justice or justices have power to summon a jury to try the forcible entry or detainer complained of; and if the same be found by that jury, then, besides the fine on the offender, the justices shall make restitution by the sheriff of the possession, without inquiring into the merits of the title; for the force is the only thing to be tried, punished, and remedied by them; and the same may be done by indictment at the general sessions. But this provision does not extend to such an endeavor to maintain possession by force where they themselves, or their ancestors, have been in the peaceable enjoyment of the lands and tenements for three years immediately preceding."

The statute of 5 Rich. II., st. 1, c. 7, is as follows: "The penalty where any doth enter into lands where it is not lawful, or with force. And also the king defendeth: That none from henceforth make any entry into any lands and tenements, but in case where entry is given by the law; and in such case not with strong hand, nor with multitude of people, but only in peaceable and easy manner. 2. And if any man from henceforth do to the contrary, and thereof be duly convict, he shall be punished by imprisonment of his body, and thereof ransomed at the king's will." This quaint phraseology, especially that of the prohibitory clause, has been retained in the statutes of very many of the states of the Union, where the remedy for a forcible entry and detainer is but one of a civil nature for the restitution of the premises taken by force. The substance of this enactment is included in all of the existing legislative enactments of this country upon the subject, some of which, however, undoubtedly go further, and define as forcible, acts that would not have been so considered under 5 Rich. II.

The definition of "forcible entry," given by Tomlins, 1 Law Dict., on the authority of 1 Hawk., c. 64, sec. 25, *et seq.*; and 3 Bac. Abr., tit. Forcible Entry B., is a clear statement of what acts are embraced by the expression, and is applicable in all those jurisdictions where the local legislatures have not interposed to broaden the English statute: "A forcible entry is only such an entry as is made with a strong hand, with unusual weapons, an unusual number of servants or attendants, or with menace of life or limb; for an entry which only amounts in law to a trespass, is not within the statutes. But an entry may be forcible, not only in respect of a violence actually done to the person of a man, but also in respect of any other kind of violence in the manner of the entry, as by breaking open the doors of a house, whether any person be in it at the time or not; especially if it be a dwelling-house. So if a man enter to distrain for rent with force; for, though he does not claim the land itself, he claims a right and title out of it. And though a man enter peaceably, yet if he turn the party out of possession by personal threats or violence, this also amounts to a forcible entry; but not if he merely threaten

to spoil the party's goods, or destroy his cattle, or do any injury which is not of a personal nature."

As a general rule it may be stated that to render an entry forcible within the meaning of the terms forcible entry and detainer, there must be a taking possession of realty by the use of actual physical force in and upon the premises, or by violence directed or threatened to be directed against the person in occupancy. Some of the states have declared that an entry obtained by stealth, which might indeed be accomplished without resort to force or violence, was forcible, within the meaning of the statute. The jurisdictions wherein this is the law will be pointed out hereafter. It must be borne in mind that an entry which is plainly unlawful, may be nevertheless made without force or violence, though it is without contradiction that a forcible entry as above defined is unlawful. This distinction accounts for the failure of the plaintiff to recover, in some instances, where he has declared upon a forcible entry, and has given evidence of one unlawful. A comprehensive view of what is regarded by the courts as constituting a forcible entry, can only be obtained by considering the statutes of the several states, with reference to which the decisions have been pronounced. In many states almost the identical language of 5 Rich. II., st. 1, c. 7, has been retained, with the substitution of "force" in the place of "strong hand," in some cases. And these states are New York: 3 R. S. of N. Y. p. 820; Massachusetts: Gen. Stat. of 1860, ch. 137, sec. 1; Vermont: Gen. Stat. p. 357, sec. 1; Illinois: R. S., ch. 57, sec. 1; North Carolina: Battel's Revisal, p. 428; South Carolina: R. S. 534; Maryland: Alex. British Stat. in Force in Md.; Texas: Dig. Art. 3869; Wisconsin: Statutes, p. 1753; Nevada: Comp. Laws, sec. 41; Michigan: Comp. Laws of 1871, ch. 211, sec. 1; Minnesota: Stat. at Large of 1873, p. 895, sec. 80; Oregon: Gen. Laws, p. 743, omitting the phrase, "not with strong hand, nor with multitude of people;" and in Idaho: R. L. of 1874-5, sec. 570.

The judicial construction of the words "force," or "strong hand," and "with multitude of people," and "in a peaceable manner," the vital words in the definition employed by the enactments of the above states, is illustrated by the following examples: The facts in *Willard v. Warren*, 17 Wend. 257, were in substance that the defendant entered upon a farm which the plaintiff was occupying, drove her cattle into the highway, broke open a granary in the barn which was locked, and took possession of the whole of the farm, except a log-house in which she resided. There was no force or terror arising from number, and no personal violence had been used. The action brought was trespass for treble damages, under the statute. The court quoted Tomlin's definition of forcible entry, reviewed early English and American authorities, and concluded that there must be circumstances of force or terror in respect to the person, without which the case then under consideration amounted to no more than a mere trespass. In *Wood v. Phillips*, 43 N. Y. 152, the plaintiff was a tenant in common of the premises, a school-house, in the actual possession of the defendants, who claimed to hold in exclusion of the plaintiff. The latter climbed into the house through a window early one morning, when it was unoccupied, took off the locks, and put them on so as to fasten the door on the inside. Having the right to the possession as tenant in common, the court said the plaintiff had a right to acquire it in a peaceable manner, and that although she did obtain possession by stealth, yet it was without tumult or a breach, and in a peaceable manner, in a way which the law justified. Says Judge Folger for the court: "The proceedings under the statute (of forcible entry and detainer), in earlier days, were in their nature criminal, for the redress of the wrong to

the public done by a breach of its peace. The statute was not intended to confer rights. The main object still is to preserve the public peace, and prevent parties from asserting their rights by force or violence, though by gradual additions the remedy has become, in effect, a private as well as a public one. But the form of the proceeding, and the rules of law which govern it, remain to a great degree unchanged. Still, there must be present, to secure conviction, proof of a wrong done to the public. A mere trespass will not sustain the proceeding. There must be in the acts of him who is complained of an element of force or violence, or terror to others: *Porter v. People*, 7 How. 441, 445; *People v. Van Nostrand*, 9 Wend. 50, 52; *Hyatt v. Wood*, 4 Johns. 150, 158; *Commonwealth v. The Keeper*, 1 Ashmead, 140, 145, 146."

The Connecticut case of *Gray v. Finch*, 23 Conn. 515, evinces the understanding of the courts of that state, of what a forcible entry is, although the term is not explicitly defined by the statute. It is stated in the opinion to be necessary, in order to constitute an entry forcible, that it should be made "with what is called strong hand, as with an unusual number of people, with weapons, with menaces, or accompanied with some circumstances of actual violence, calculated to intimidate the plaintiff and deter him from asserting or maintaining his right. And that an entry, which has no other force than such as is implied by law in every trespass, is not a forcible entry within the meaning of the statute."

Says Graves, J., in *Seitz v. Miles*, 16 Mich. 471, an action of forcible entry and detainer, in which the defendant obtained possession of the premises by threatening the plaintiff that he would have a writ of restitution served, which defendant had sued out, if plaintiff did not yield the possession: "To constitute a forcible entry within the meaning of the statute, it is not necessary that the actual invasion of the premises should, at the very moment, be attended by the circumstances requisite to give it the character of a forcible entry, or be accompanied by threats, actual force or violence, or any conduct which would constitute a breach of the peace; but if the entry be obtained by stealth or stratagem, or without real violence, and the party entering evinces his purpose in having entered to have been the forcible expulsion of the party in possession, and it is followed up by actual expulsion by means of personal threats or violence, or superior force, it will amount to a forcible entry: *Williams v. Warren*, 17 Wend. 257, and cases cited; *Saunders v. Robinson*, 5 Met. 343; *Commonwealth v. Shattuck*, 4 Cush. 141; *People v. Smith*, 24 Barb. S. C. 16." This decision was explained and followed in *Hoffman v. Harrington*, 22 Mich. 52, 57, in which the alleged forcible entry complained of was the entering upon, fencing, and occupying a vacant lot, on which the plaintiff had placed some spars. There was no one occupying the premises when the defendant entered, nor was there any possession in the plaintiff, except that his spars were laid there. Referring to *Seitz v. Miles*, *supra*, Chief Justice Campbell said: "That case decided what has been held by most of the common law authorities, that the forcible expulsion was the real thing aimed at, and if the possessory act was completed either by the use of force, or by the exhibition of such superior force as actually intimidated the party and induced him to leave, it was not necessary that he should have resisted it and compelled an actual breach of the peace. The principal question in issue was, whether, by leaving without a conflict, the party did not acquiesce in the entry. And it was held that if the force was superior, and there was a threat to use it, which the possessor had reason to believe would be carried out, the case came within the law. This was in accordance with the law as laid down by Hawkins, Forcible En

tries, 501, and by other authorities cited in *Seitz v. Miles*. It was merely to correct the notion that there must be an actual, and not threatened breach of the peace; but it was not designed to qualify the nature or extent of the force used or exhibited, nor to change the law that the possession must be secured by the actual expulsion, by such force, of the tenant. There can be no force used of this kind in entering on open lands where no one is in charge. As said by Judge Livingston, in a similar case, in *McDougall v. Sticher*, 1 Johns. 42: 'the goods which were left could not prevent the entry being peaceable. They were incapable of resistance, and, therefore, no breach of the peace could ensue.' See, also, *Harrington v. Scott*, 1 Mich. 17; and *Davis v. Ingersoll*, 2 Doug. (Mich.) 372. And in the Michigan case of *Latimer v. Woodward*, 2 Doug. 368, it was held that there was no forcible entry unless the force and the entry combined were the means of getting into possession in the first place. When once in possession without force, to the exclusion of the former possessor, the new tenant, if responsible at all for using force to defend his possession thereafter, is liable for forcible detainer, and not for forcible entry. He commits no more than an ordinary trespass if he had no right to enter, and if he had a right to enter, and does so peaceably, he commits no wrong at all." The conduct of the defendant was deemed not to be a forcible entry. And in *Shaw v. Hoffman*, 25 Mich. 162, under the statute giving triple damages for a forcible expulsion of the occupant from the premises, the force contemplated by the statute is declared to be not merely the force used against or upon the property, but force used or threatened against persons as a means, or for the purpose, of expelling or keeping out the prior possessor.

In all of these decisions it seems to have been requisite that there should have been some personal violence or threats thereof toward, or intimidation of the one in the occupancy of the premises, although Chief Justice Beasley, in *Mason v. Powell*, 38 N. J. L. (9 Vr.) 576, considers that even at common law, the taking possession of a house by breaking into it, in the absence of the owner, constituted a forcible entry. This doctrine proceeds on the idea that the statute was intended to prevent and to punish acts tending to excite a breach of the peace. Where there was no such act the entry was not forcible. Some of the state courts, where statutory provisions prevail similar to those of New York and Michigan, adopt a more liberal construction. For example, an entry made under the following circumstances was considered forcible in *Ainsworth v. Barry*, 35 Wis. 136: "The dwelling house was undoubtedly in possession of the plaintiff, though vacant at the time. The doors and windows were all fastened in the usual manner. There had been some negotiations between the parties about purchasing the property, but it is fair to assume that no trade had been consummated by a sale and delivery of possession. The plaintiff held the key. The defendant had asked him for it and had been refused. The defendant then made an entry into the house after dark, by forcing open a window which was fastened after trying to get in through the back door. He thus obtained possession and occupied the house for a day or two with his family and household goods before the plaintiff knew of his entry." The defendant refused to deliver up the possession when ordered by the plaintiff to do so. This opinion was regarded as sound, and was followed in *Steinlein v. Halstead*, 42 Wis. 422. There the defendant, with the aid of six or eight men, hastily tore down a part of the fence around a lot which had been in the peaceable possession of the plaintiff for more than a year and a half, and with great haste moved thereon a shop, in the absence of the plaintiff and of his family from his premises, and without personal violence or intimidation towards any one, but without the plaintiff's consent.

The acts made the entry forcible. The breaking down and destroying by axes and hatchets a fence, erected by the plaintiff around a lot, was likewise so considered in *Allen v. Tobias*, 77 Ill. 169. Another Wisconsin authority, holding that an entry by force into a building without any violence used or offered to any one, is forcible within the meaning of the statute, is *Jarvis v. Hamilton*, 16 Wis. 575; S. C. 19 Id. 188. And to the same effect, where the entry was made in the plaintiff's absence, are *Warren v. Kelly*, 17 Tex. 544; *Holmes v. Holloway*, 21 Id. 658.

In Vermont, Judge Redfield gives an exhaustive review of the statutes and decisions, English and American, with their reasons, in *Duston v. Coudry*, 23 Vt. 631. That case presented a glaring instance of a forcible entry; the defendants, stewards of the Methodist Episcopal church, having, against the strenuous resistance of the plaintiff and his friends, actually expelled from the house the family, at an inclement season of the year, and turned them and their household goods into the public highway. There was no doubt there of the nature of the entry. But in the subsequent case of *Mussey v. Scott*, 32 Vt. 82, where the defendant, who had been in the peaceable possession of the premises under a contract, failed to comply with some of its terms, and had left the house for a day only, locking the doors, the plaintiff, in his absence, broke open the doors and entered. On the defendant's return he forcibly turned the plaintiff out, for which the action was brought. The court maintained that the plaintiff, in breaking open the doors, entered, but in a legal manner, exercising a legal right, and gained thereby such a possession as would support his action. And in *Foster v. Kelsey*, 36 Vt. 199, 201, Judge Aldis emphatically says that "a forcible entry must be accompanied either with actual violence or with circumstances tending to excite terror, and to intimidate the owner or his servants from maintaining his right. Hence the words of the statute as to a peaceable entry, 'not with strong hand, nor with multitude of people, but in a peaceable manner.' Hence, not only acts of violence, but the having of unusual weapons, or threats or gestures denoting an intent to do bodily hurt, or the assembly of an unusual number of persons, are held to be *indicia* of forcible entry." And as the defendant, by night, furtively, and without using any force or violence, entered an unoccupied house, the court thought his conduct amounted to no more than a mere trespass. The defendant subsequently forcibly prevented the plaintiff from putting his cattle into the field to drink. This fact, however, was not urged upon the notice of the court as rendering the original entry forcible, by relation.

One other decision will be adverted to before attempt is made to draw some conclusion with respect to the understanding of what constitutes a forcible entry in those states where the English statute of 5 Rich. II. has been adopted. In *Pike v. Witt*, 104 Mass. 595, the defendants, with a workman, went to a tenement in the occupation of the plaintiff, but in which there was no one at the time, and the door of which was fastened with a padlock, demanded the key from the plaintiff's servant, and upon his refusal, ordered their workman to enter the premises through a hole in the floor. He did so, and they, with the assistance of an ax, and of the workman inside, removed the clasp from the door, and entered upon the premises. The defendants used or offered no language or acts of violence to the plaintiff's servant. The lower court instructed the jury as follows:

"To constitute a forcible entry which would support this action, the plaintiff must prove by a preponderance of evidence that the defendants entered the premises described in the declaration by actual force, accompanied by an

exhibition of means of applying such force, or any other acts, demonstrations, or declarations indicating to the plaintiff's workman, in attendance there at the time, their purpose to forcibly enter the premises in spite of any resistance, which it was his duty or disposition to make to such forcible entry, and calculated to overpower such disposition. Such acts, demonstrations, or declarations must have been in the nature of menaces, by a show of persons appearing to take part in the purpose of entry, or a show of weapons or mechanical means sufficient to alarm said workman, and deter him from maintaining the plaintiff's occupation, because of apprehensions of bodily harm or force by the applications of the defendants to his own person. A forcible entry by merely mechanical force applied against the consent of the plaintiff, or his agent there present, would not be a forcible entry within the meaning of the law." The jury found for the plaintiff. On appeal, the instructions were recognized as correct; but as the evidence was not deemed to justify the verdict, it was set aside.

From a review of these authorities, the following propositions may be deduced: In the states above named, a forcible entry may consist in: 1. The forcible physical expulsion of one in the actual possession of lands, and the taking of that possession; 2. Entering upon lands, and with the aid of a number of assistants, driving out the occupant; 3. Entering upon lands, and with threats of personal injury driving out the occupant; 4. Entering upon lands with the manifest design of dispossessing the occupant, thereby exciting his fear of bodily hurt, in case of resistance, and causing him to leave, though no violence may have been used; 5. And in Wisconsin and Texas, breaking into a building that has been fastened, although the occupant be absent at the time.

In the several other states, the first four acts above named are recognized as constituting a forcible entry. In many of them, moreover, the language of the respective statutes is much broader than the old act of 5 Rich. II., and includes as amounting to a forcible entry conduct which would not be so regarded under the strict construction of that act. These statutes, with respect to which the opinions were pronounced in the cases hereinafter cited, are:

"A forcible entry and detainer is where one, by force or strong hand, or by exciting fear or terror, enters upon and detains lands or tenements in the possession of another: as by breaking open doors, windows, or any other part of a house, whether any person be within or not; by threats of violence to the party in possession, or by such words or actions as have a tendency to excite fear or apprehension of danger; by putting out of doors or removing the goods or chattels of the party in possession; or by entering peaceably and then, by force or threats, turning or keeping the party out of possession." Section 3299, Revised Code of Alabama. The Arkansas statute, sec. 2933, Ark. Dig. 1874, and that of New Jersey, Revision of 1877, p. 440, sec. 2; of Tennessee, Statutes, sec. 3342; of Colorado, R. S., chap. 35, sec. 2; of Missouri, Code of Procedure, sec. 2419, are substantially the same.

Section 1159 of the Code of Civil Procedure of California, to which section 636 of the Codified Statutes of Montana of 1871-1872, and Brightly Dig. of Pennsylvania Laws, p. 221, sec. 23, are similar, reads: "Every person is guilty of a forcible entry who either: 1. By breaking open doors, windows, or other parts of a house, or by any kind of violence or circumstance of terror enters upon or into any real property; or, 2. Who, after entering peaceably upon real property, turns out by force, threats, or menacing conduct the party in possession."

In the Georgia Code, "Forcible Entry" is thus defined: "Forcible entry is the violently taking possession of lands and tenements with menaces, force, and arms, and without authority of law:" Section 4524.

Indiana has a like provision in its statutes: 2 Stat. of Indiana, Revision of 1876, p. 462. These two sections appear to be as limited as 5 Rich. II., and in substance differ little from that enactment.

The statutes of Mississippi, R. C. of 1871, sec. 1582, and of Dakota, R. C. of 1877, p. 716, sec. 34, resemble the following in their definition of a forcible entry. A forcible entry and detainer arises "where the defendant has by force, or intimidation, or fraud, or stealth, entered upon the prior actual possession of another in real property, and detains the same:" Section 3611, Code of Iowa, 1873.

And the comprehensive provision in the Kentucky statutes is: "A forcible entry, in the meaning of this chapter, is an entry into lands or tenements without the consent of the person having the possession, in fact, of the premises:" Sec. 500, Civil Code of Ken.

In other states, forcible entries, and forcible entries and detainers, are prohibited, without receiving any legislative definition other than can be inferred from the use of the terms as contradistinguished from, in a peaceable manner. Such is the case with Virginia, West Virginia, Rhode Island, Nebraska, Delaware, Kansas, and Arizona Territory.

Under the foregoing statutes the following decisions have been announced: Force in taking possession of the land is the very gist of the proceeding for a forcible entry: *Curry v. Hendry*, 46 Ga. 631; but only a show of force is necessary: *Minor v. Duncan*, 54 Id. 516; such a show of force as to make resistance useless. The "show" of force deemed sufficient in the last citation was in this: The plaintiff's son was plowing in oats in his father's field, when the defendant, accompanied by some half a dozen men, one or two of whom remained to the end, assisting him, came into the field and pulled down the fence and moved it into the field, telling the son to plow over it if he wished. The latter did so until the fence became too high and then desisted, being alone. The defendant remained in possession of the part of the field so cut off. And the forcible entry is not complete until the occupant is expelled: *Grughler v. Wheeler*, 12 B. Mon. 183; *Hoffman v. Harrington*, 22 Mich. 52.

Again: One who, with armed men, enters upon land inclosed with a fence and in the possession of another, and commences the erection of a house, and refuses to deliver up peaceable possession on demand, but makes a show of force to retain it, is guilty of a forcible entry and detainer: *Watson v. Whitney*, 45 Cal. 375; *Polack v. McGrath*, 23 Id. 54; *Buel v. Frazier*, 36 Id. 696; *Gray v. Collins*, 42 Id. 157; *Brown v. Perry*, 39 Id. 23. In the comparatively early case in New Jersey of *Butts v. Voorhees*, 13 N. J. L. (1 Green, 12), the local statute was interpreted to mean that "such words, circumstances or actions, in addition to the force requisite to constitute an ordinary trespass, 'as have a natural tendency to excite fear or apprehension of danger,' render a person guilty of a forcible entry and detainer. The change in the mode of the prosecution from an indictment to a civil action, made by our statute, was not designed to effect any alteration in the nature or component parts of the offense itself." Referring with expressions of approval to this decision, Judge Carpenter, in *Berry v. Williams*, 21 N. J. L. (1 Zab.) 423, 428, said in explanation: "It was there held, in accordance with the common law doctrine, which is simply embodied in this statute, that there must be more than the technical force which will constitute trespass, and that there must be

actual force or threats, or other circumstances calculated to excite fear or apprehension of danger. But undoubtedly actual force, controlling force or violence, which will constitute this offense, may exist without producing any apprehension of personal danger in the mind of the person removed or kept out of the premises. It will be sufficient if he submit, upon, or in consequence of, apparent inability to resist the physical force arrayed against him, without its being shown or inferred that he was under fear of personal injury."

In the still later decision: *Mason v. Powell*, 38 N. J. L. (9 Vr.) 576, another branch of the statute of that state was brought before the court, and it was held that the act of forcible entry was complete by breaking into a house and taking possession of it in the absence of the owner.

Not only will the fear of personal injury, leading to the surrender of possession to the one exerting such fear, constitute the offense, but reasonable fear of a violent ouster of the goods of the person in possession, under the Iowa statute, will enable the party dispossessed by such fear to recover possession in an action of forcible entry and detainer: *Harrow v. Baker*, 2 Greene, 201. And the obtaining possession of land by fraud and stealth is recognized in *Stephens v. McCloy*, 36 Iowa, 659, as entitling the one dispossessed to his action. In Illinois this very comprehensive doctrine prevails: If one enters into the possessions of another against the will of him whose possession is invaded, however quietly he may do so, the entry is forcible in legal contemplation: *Croff v. Ballinger*, 18 Ill. 200; *Smith v. Hoag*, 45 Id. 250. The statutes of other states, above set forth, would seem to warrant the same construction.

From this review of some of the cases and of the statutes, it will appear that the four classes of entries before described, would be considered forcible in any of our states; that, as is expressly stated in Wisconsin and Texas, in the majority of the states, to constitute an entry forcible it is not essential that it should have been made in the presence of the occupant; that in some jurisdictions entry by stealth is regarded forcible, and in others, that though the entry may have been peaceable, it would be deemed forcible by relation, where the intruder keeps the one dispossessed out of possession.

POSSESSION NECESSARY TO RENDER ENTRY FORCIBLE.—As the remedy by forcible entry and detainer was originated to prevent breaches of the peace, without reference to the right of the person endeavoring forcibly to eject the occupant to the land, the action lies whether the one forcibly entering had title or not. The question of title is not involved. The possession and the forcible entry are the questions in issue: *Emerson v. Sturgeon*, 59 Mo. 404; *Beeler v. Cardwell*, 29 Id. 72; *Warren v. Kelly*, 17 Tex. 544, and the cases cited below: "Nothing is more firmly settled by repeated decisions of this court, than that in actions of this kind there can be no inquiry into the title to the property involved, that the law forbids a forcible entry with or without title, and that it is immaterial whether the intruder is a mere trespasser or enters under a paramount title, for if he has the right to the possession, he must resort to the authority of the law to obtain it: *Stone v. Malot*, 7 Mo. 158; *Warren v. Ritter*, 11 Id. 354; *Spaulding v. Mayhall*, 27 Id. 377; *Beeler v. Cardwell*, 29 Id. 72; *King's Admr. v. St. Louis Gas Light Co.*, 34 Id. 34; *Harris v. Turner*, 46 Id. 438;" *Dilworth v. Fee*, 52 Mo. 130, 133.

The possession must be actual: *Mann v. Brady*, 67 Id. 95; *Thompson v. Soonerberger*, 59 Id. 326; *Norly v. Butler*, 10 B. Mon. 48; *Russell v. Desplous*, 29 Ala. 308, as contradistinguished from a constructive or scrambling possession: *Conroy v. Duane*, 45 Cal. 597; *Voll v. Butler*, 49 Id. 75, and it must be bona fide, and not a sham: *De Graw v. Prior*, 60 Mo. 56. A temporary ab-

sence, however, does not deprive the possessor of his right: *De Graw v. Prior*, 53 Id. 316. But if one abandons real property, he can not complain that an entry was forcible. For example, in *Laird v. Waterford*, 50 Cal. 315. One who had peaceably entered upon a mining claim which had been worked for prospecting purposes by another, but on which said other had not worked for several months, and which he had not occupied for the same length of time, is not guilty of a forcible entry. The land was public land. Prior to defendant's entry plaintiffs had not marked off or designated by boundaries, the ground claimed by them. And in *Davis v. Woodward*, 19 Minn. 174, a man who had deserted his wife, who remained living upon the premises, was said to have sufficient possession to maintain the action.

As a single instance, illustrating the extent to which this doctrine of possession as against the rightful owner is carried, we refer to the facts in one decision: The plaintiff went into a field near his cabin, and, without leave, plowed and planted about eight acres in corn and potatoes. He had no right thus to enter, and the defendant who had the right of possession forcibly dispossessed him. These facts were pronounced insufficient to warrant the forcible dispossession. The defendant should have resorted to the means provided by law: *Harris v. Turner*, 46 Mo. 438.

To render a possession actual it is not necessary that there should be fences or inclosures of any kind erected: *Goodrich v. Van Landigham*, 46 Cal. 601. The possession of uncultivated and unimproved land, to support an action for forcible entry and detainer, does not require that the owner should always be on the land, either by himself or his agent. If an entry is made with the intention of retaining the permanent possession, and clearing and improving the land, and fitting it for cultivation, it may be sufficient, and authorize the inference that the possession was actual: *Bradley v. West*, 60 Mo. 59. In this case the plaintiff entered upon the land for the purpose of cultivation and improvement; that he traced out the boundaries, and threw up mounds at the corners of a part of it, and when the defendant came upon the land, he ordered him off, saying it was his.

It is immaterial in what capacity the plaintiff was in possession, whether as owner, agent, tenant, or a mere trespasser: *Emsley v. Bennett*, 37 Iowa, 15. A tenant at will, if forcibly dispossessed, may maintain the action: *Joney v. Shay*, 50 Cal. 508. As against one who endeavors forcibly to assert a right to the possession of land, it is the uniform rule to allow the action against him, although the actual occupant has no title to the land nor right to the possession thereof. But where the possession is obtained in a peaceable manner, a different rule has been applied. Says Judge Folger, delivering the opinion of the court, in *Wood v. Phillips*, 43 N. Y. 152, 158: "Now, we have already stated that the entry of the plaintiff was in the eye of the law an orderly one. Those authorities, then, which hold that proceedings for forcible entry and detainer will lie against one, though he be the legal owner, come short of upholding the position that the plaintiff, being the legal owner, and having the right of possession, had not the right by her own act to acquire possession in an orderly and peaceable way." And asserting the same principle is *Tucker v. Phillips*, 2 Met. (Ky.) 416.

LAMBERT v. SANDFORD.

[2 BLACKFORD, 137.]

A *NOLLE PROSEQUI* to the whole declaration is not, like a *retrazit*, a bar to a future action for the same cause.

AN ATTORNEY AT LAW HAS NO AUTHORITY to enter a *retrazit*, that being a perpetual bar.

A JUDGMENT WILL NOT BE REVERSED because a motion for a new trial, made on the ground that the verdict was against evidence, unless it is clear that the verdict was not warranted by the evidence.

GIVING TIME TO THE DRAWER.—If a payee of a bill of exchange, accepted for the drawer's accommodation, give time to the drawer without the acceptor's knowledge, the latter is not thereby discharged, though the payee knows all the facts.

ERROR to the circuit court. The opinion states the case.

Judah and Dewey, for the plaintiff.

Tabbs, *contra*.

BLACKFORD, J. Sandford, as the indorsee of Boudinot, brought this action of assumpsit against Lambert, as the acceptor of a bill of exchange, drawn by Hamilton in favor of Boudinot, cashier. The defendant, Lambert, pleaded first non-assumpsit; on which issue was joined. He pleaded, secondly, that the bill became the property of the Bank of Vincennes by the blank indorsement of Boudinot, cashier, and his delivery thereof to the bank; that the bank, owners of the bill, sued the defendant, Lambert, thereon; and after service of the writ, and after the defendant had pleaded, the parties appeared by their attorneys, and the plaintiffs would not further prosecute their suit, therefore it was considered that the plaintiffs should take nothing by their writ, but be in mercy, etc., and that the defendant should go thereof without day. To this plea there was a general demurrer, and judgment for the plaintiff. The defendant pleaded, thirdly, that on the first of July, 1822, the charter of the Bank of Vincennes became forfeited, and its franchises were seized by the state; and that at the time of the forfeiture and seizure the bill belonged to the bank. To this plea the plaintiff replied that at the time of the seizure the property of the bill was not in the bank. On this replication issue was joined.

On the trial of the issue the defendant offered to prove that he accepted the bill for the accommodation of the drawer, which was known at the bank when the bill was discounted; that after the bill became due, the bank stopped the drawer at Vincennes

on his way down the river, in May, 1821, in consequence of the non-payment of the bill, and then agreed to give him three months for payment from the time the bill became due, on his paying the discount; that the discount was paid, and the credit given without the knowledge of the defendant; and that the drawer was, at the time of this arrangement, able to pay. This testimony was objected to and the objection sustained.

At the trial it was admitted that the franchises of the bank were seized on the first of July, 1822. The plaintiff proved the signatures of the acceptor, indorser, and drawer. He proved that on the eighth of February, 1822, Hart, as attorney of Sandford, the plaintiff, gave notice to the defendant that the bank had assigned the bill to Sandford. He proved that Tabbs, as attorney of the bank, in the fall of 1821, or winter of 1822, had filed a declaration against Lambert on the bill; that the bill, when delivered to him, belonged to the bank; that shortly after the commencement of the suit for the bank, it was conducted by him and Hart, under the impression that the property was in Sandford; that from the spring or winter of 1822, he considered the bill as the property and under the control of Sandford; that the bill was always in Tabbs' possession from its delivery to him until it was filed in the papers of the suit; that Sandford never had actual possession of the bill; that Tabbs had only been attorney for Sandford as to this bill, since Hart's death, in December, 1822; that the indorsement on the bill, "Pay to Isaac Sandford or his order," was made at the April term, 1825; that Tabbs' receipt to the bank for collection had been returned to him; and that the suit of the bank against the defendant was dismissed at the October term, 1824.

This was all the evidence in the cause. The jury gave a verdict for the plaintiff for one thousand and twenty dollars in damages; a motion for a new trial was made and overruled, and judgment rendered according to the verdict.

The plaintiff in error relies upon three grounds for the reversal of the judgment: 1. That the second plea was a good bar, and the demurrer to it should not have been sustained; 2. That the court should have granted a new trial, the plaintiff below having failed to prove any property in the bill; 3. That the evidence offered as to the discharge of the defendant, on account of time given to the drawer, should have been admitted.

As to the first objection, assuming that the suit of the bank was disposed of by a *nolle prosequi*, which is the most that

the plaintiff in error contends for, we think the law is against him. It has been held that a *nolle prosequi* can not be distinguished in reason from a discontinuance, for in either the party may afterwards commence another action for the same cause: *Cooper v. Tiffin*, 3 T. R. 511. And in a late valuable book on practice, one of the grounds on which a *nolle prosequi* to the whole declaration is distinguished from a *retraxit* is, that the former is not a bar to a future action for the same cause: 2 Arch. Prac. 250. Besides, the plea states this disposition of the cause to have been made by the attorney, who had no authority to enter a *retraxit*, because that is a perpetual bar: *Kellogg v. Gilbert*, 10 Johns. 220 [6 Am. Dec. 335]. If a *nolle prosequi*, therefore, when made in person were a bar to another suit, it would not be so in this case, the entry here being by attorney.

The second objection is not more substantial than the first. It is true that the evidence is not clear as to whether the property of the bill was in Sandford or in the bank, at the time the franchises of the corporation were seized. The indorsement of Boudinot, the payee, was in blank. The gentleman who had the bill, and was attorney for the bank, considered it for a considerable time before the seizure as the property of Sandford and under his control. His reasons for so considering it are not stated. If the defendant below supposed them insufficient, he should have inquired what they were. The jury to whom the question was submitted, after hearing a variety of testimony, have determined it in favor of the plaintiff below, and the court in which it was tried has refused to disturb the verdict. Considering the point, as we do, a doubtful one, it becomes us, as an appellate court, to let it rest where it is.

The third objection is one of more difficulty. A bill is accepted for the drawer's accommodation, and a bank, not knowing that, discounts it for the drawer. The bill becomes due, and the bank gives the drawer an additional credit, without the knowledge of the acceptor. The question is, Does this indulgence to the drawer discharge the acceptor as to a holder who received the bill after it became due? The plaintiff in error contends, that the acceptor here is only a surety, and refers to a case in Hardress, 485. Should that case be thought to bear upon this, it is answered by *Raborg v. Peyton*, 2 Wheat. 385, which expressly overrules it. Indeed, without going further, this latter decision settles the point that the acceptor, whether for the drawer's accommodation or not, is a principal, and not a surety, as to the payee. The court says that, "*prima*

facie, every acceptance affords a presumption of funds of the drawer in the hands of the acceptor, and is of itself an express appropriation of those funds for the use of the holder. The case may, indeed, be otherwise, and then the acceptor, in fact, pays the debt for the drawer, but as between himself and the payee it is not a collateral, but an original and direct undertaking. The payee accepts the acceptor as his debtor, and he can not resort to the drawer but upon a failure of due payment of the bill." In the case before us, the bank lent the money to Hamilton upon the security of this bill; that Lambert should be the acceptor, and, therefore, liable as the principal, was the consideration of the loan. Had it been otherwise, it is fair to presume that Hamilton would have been the acceptor. The bank's knowledge that the acceptance was for the drawer's accommodation is not considered material; for it was not, in our opinion, essential to the validity of the bill, or to its legal effect, according to its face, as respected the payee, that the acceptor should be benefited by the consideration. In this view of the subject, the time given to Hamilton can not affect the responsibility of Lambert, the principal in the contract. He was liable to a suit on his acceptance at any time after the bill became due, and could derive no benefit, not even of delay, from the bank's arrangement with the drawer for time. Neither could the indulgence to the drawer operate to the injury of the acceptor; for if, before the expiration of the time given, Lambert had been compelled to pay, his remedy over against Hamilton, he would not have been retarded by the arrangement between the latter and the bank, with which Lambert had no concern, and by which he could not be bound. As to this third ground relied on by the plaintiff in error, his strong authority is *Laxton v. Peck*, 2 Campb. N. P. 185. That case, however, is contradicted by the subsequent one of *Fentum v. Pocock*, 5 Taun. 192, cited by the defendant in error. The latter is in accordance with our ideas of the law.

By COURT. Judgment is affirmed, with one per cent. damages and costs.

CUTLER v. COX.

[2 BLACKFORD, 178.]

A PLEA OF FORMER RECOVERY is good in bar, if it contains sufficient matter to show that the causes of action in the two suits were the same, and that the merits were determined in the first case.

A PLEA OF FORMER RECOVERY to an action on the case founded on a tort, can not be objected to merely because the first action was covenant, the causes of action being the same.

IN COVENANT FOR THE BREACH OF A CONTRACT, accompanied with fraud, the fraud may be averred in the declaration, and may be made the subject of inquiry in the action.

IN CASE FOR FRAUD for the breach of a contract, the gist of the action is the fraud committed at the time of the breach.

IF A PLEA OF FORMER RECOVERY aver the causes of action to be the same, and the record do not show them to be different, the averment on demurrer to the plea must be taken as true.

IF IN A FORMER ACTION OF COVENANT for the same cause, now made the subject of an action for a tort, accord and satisfaction be pleaded, and issue be joined on a replication, and the defendant recover judgment, it is a good plea in bar to the present action.

WHERE ONE OF TWO PLEAS to the whole cause of action be adjudged good on demurrer, the other need not be considered.

ERROR to the circuit court. The opinion states the case.

Hesler, Sweetser and Gregg, for the plaintiff.

Whitcomb and Fletcher, contra.

BLACKFORD, J. This was an action on the case founded on tort. The declaration contains four counts. The first three state that the parties entered into an agreement, under seal, by which the defendant became bound to build for the plaintiff a good and sufficient New Orleans boat, for a certain and fair price; that the boat was built and delivered, and the price paid; and at the time of delivery there were defects in the boat, which were under the water and not discoverable; that on taking the boat about three miles from the place of delivery it sank in consequence of those defects. The first two counts aver that the defects were known to the defendant; and the third contains an express warranty. The fourth count states that the plaintiff bargained with the defendant to buy of him a New Orleans boat for a certain price; that the price was accordingly paid, and the boat delivered as a good and sufficient New Orleans boat; the averments in this fourth count as to the defects, the defendant's knowledge, and the loss of the boat, are similar to those in the first two counts. All the counts allege special damage to a large amount, occasioned by the loss of the boat.

There are two special pleas in bar. The first is substantially as follows: that the plaintiff had previously impleaded the defendant, in a plea of covenant, to recover damages for the non-performance of the agreements in the several counts of the present declaration mentioned; that the defendant pleaded an accord

and satisfaction, on which issue was joined; that the parties produced their evidence on the trial of that issue; and that the verdict and judgment were in favor of the defendant, and were still in force. The plea also avers, that the New Orleans boat, mentioned in the action of covenant, is the same with that in this suit mentioned; and that the sealed agreement, set forth in the action of covenant, and the agreements, breaches, and offenses in the present declaration mentioned, are the same identical agreements and breaches, and not other different agreements, offenses or breaches. There was a general demurrer to this plea, and judgment for the defendant.

As to form, this plea is very defective; but with that objection we have nothing to do on a general demurrer. If it contains sufficient matter to show that the causes of action in the two suits were the same, and that the merits were determined in the first case, the plea is a good bar.

The first inquiry then is, Were the causes of action the same? All the counts in the present action, it is true, are founded in tort; but, at the same time, they all set out a contract, and show that this action is brought for a deceit in the performance of that contract. The first three counts explicitly state the contract to be under seal; the fourth is silent as to the seal, but the plea avers the agreement here stated to be the same sealed agreement mentioned in the other counts, and the demurrer admits it to be so. The counts, also, all show that the contract was for the delivery of an Orleans boat, and that the injury complained of consisted in the boat's not being as good as the plaintiff had a right to expect. It is consequently plain that these causes of complaint, here set out in this action on the case, are the legitimate foundation of an action of covenant; being the breaches of a contract under seal. Fraud, to be sure, is alleged in these breaches, but that circumstance tends to strengthen the idea of a violation of the contract. This fraud in the breaches shows, perhaps, that an action on the case for the deceit might have been supported; but it does not furnish the shadow of a reason against the propriety of an action of covenant, for the fraudulent breach of contract. That there should be two different forms of action, for a redress of the injury here complained of, is nothing extraordinary. Similar occurrences are not unfrequent. For example, if in the sale of goods there be an express warranty as to their quality, *assumpsit* lies for the breach of contract, not under seal, or *case* lies for the commission of the tort. So, if an injury be occasioned

by the negligence of an attorney, by that of a coach proprietor, etc., you may bring assumpsit on the undertaking, or case upon the duty. Other instances might easily be given. The circumstance, then, that the former was an action of covenant, is no evidence that the same injuries may not have been redressed by it, for which this action on the case is brought.

The plaintiff contends that to the plea in the former suit, he could not reply the fraud set out in the present one. Whether he could or not, we shall not stop to inquire. The fraud in the breach of contract for which this action on the case is brought, was a proper subject of inquiry in the action of covenant. The plaintiff was bound, when he resorted to the action of covenant, to adopt the measures best calculated to secure an examination in that suit, not only of the breach of contract, but of the fraud connected with it. His declaration was the appropriate place for any special averment of the fraud, like that he speaks of, which might be deemed essential to a full investigation of the subject. If the fraud was not averred, nor investigated in the first suit, the plaintiff should have shown it; and then it would have been proper to examine whether that could make any difference. No such thing, however, is shown. On the contrary, as the breach and offenses in the second action complained of are averred by the plea to be identically the same with those complained of in the first action; and as this fact is not only uncontradicted by the record, but admitted by the demurrer to the plea, we are bound to presume that all the fraud alleged in the present action on the case was included in the former action of covenant.

The plaintiff further contends that in the action of covenant, the subsequent damages could not have been known; and that therefore, for those, at least, this action will lie. This position is as untenable as the other. The gist of the action on the case is the fraud committed at the time of the breach of contract in the delivery of the boat. If the plaintiff can not maintain his action for that fraud committed at that time, no subsequent damages will enable him to maintain it, because those damages can not, of themselves, constitute a cause of action. This principle is established by a very early case. A man brought an action of assault and battery for beating his head upon the ground, and recovered. Afterwards a piece of his skull came out in consequence of the same battery, and he sued again. The former recovery, however, was held to be a bar to the subsequent suit: *Fetter v. Beale*, Salk. 11. That

decision is referred to with approbation by Justice Holroyd, in the late case of *Howell v. Young*, 5 Barn. & Cress. 259. The subsequent damages, therefore, not constituting a ground of action, furnish no reason for supposing the cause of the present suit to be different from that of the former one.

From the view which we have now taken of this case, the record does not appear to show any difference in these causes of action. To establish the difference, the plaintiff relies on the facts that the first suit is covenant, and the second case; that the gist of the one is contract, and of the other fraud; and that damages covered by the last suit have accrued since the termination of the first. These circumstances have been examined, and we find them all to be perfectly consistent with the idea that the causes of the two suits are substantially the same. The record, therefore, showing no difference in the causes of these actions, and the plea averring them to be the same, the plaintiff, in making the objection, should have denied by a special replication that they were the same, and have thus submitted the question to the determination of a jury. Instead of doing so, however, he demurred to the plea, and thus trusted the fate of his objection to the face of the pleadings. That being the case, and the record not showing the causes of action to be different, they must be considered to be the same.

The second inquiry is, Were the merits of the cause tried in the action of covenant? The plea was accord and satisfaction. The plaintiff contends that, as his action was founded on a deed, this plea was no bar. He did not, however, trust to a demurrer; and if he had so trusted he would have failed. The objection is not tenable. The action of covenant was for a wrong in the furnishing of a boat, and the object was to recover damages for that wrong. But if the plaintiff had already received a satisfaction for the injury complained of, his right of action was gone, and the defendant could certainly plead the satisfaction in bar. This is the decision in *Blake's case*, 6 Coke, 44. The plaintiff, in answer to the plea, had a right to show that it was not a true one, or that the satisfaction was not a legal one. He chose to rest his case on the former ground, and accordingly replied to the plea by denying the accord and satisfaction. Issue was joined upon that replication, both parties produced their evidence at the trial, and a verdict and judgment were rendered for the defendant. This settled the merits of the action of covenant, a competent tribunal having determined that for the injuries there complained of the plaintiff had re-

ceived a full compensation. It settles, also, the present action on the case, because the substantial causes of the two actions being the same, as has been already shown, the decision which put an end to the one must, of course, be a bar to the other. *Nemo bis vexari pro eadem causa*, is one of the first maxims of the law.

The plea, therefore, in this cause, of a former recovery, is a sufficient bar. There is another special plea, but it is unnecessary to examine it. One plea to the action being adjudged good on demurrer, the plaintiff can proceed no further.

By Court. The judgment is affirmed with costs.

RES ADJUDICATA AS AN ESTOPPEL.—See *Standish v. Parker*, 13 Am. Dec. 393, and note; *Betts v. Starr*, Id. 94, and note; *Burt v. Sternburgh*, 15 Id. 402, and note.

WHALEN v. LAYMAN.

[2 BLACKFORD, 194.]

IN AN ACTION FOR A BREACH OF PROMISE OF MARRIAGE, evidence of seduction is admissible.

ERROR to the circuit court. Sarah Layman brought an action of assumpsit against Thomas Whalen for a breach of promise of marriage. Plea, the general issue. Verdict and judgment for the plaintiff.

Sweetser, for the plaintiff.

Wick and Herod, contra.

SCOTT, J. In an action for a breach of promise of marriage, the plaintiff offered proof of seduction. The defendant objected, but the court overruled the objection, and permitted the evidence to go to the jury, and there was a verdict for the plaintiff below for one hundred dollars. The admission of evidence of seduction is complained of by the plaintiff in error, and this is the only point in the case. There is no error here. The evidence was proper for the consideration of the jury, and the court acted correctly in admitting it: 2 Stark. Ev. 942, n. 1: *Paul v. Frazier*, 3 Mass. 73 [3 Am. Dec. 95]; *Boynton v. Kellogg*, Id. 189 [3 Am. Dec. 122]. The contrary was decided in the case of *Burks v. Shain*, 2 Bibb, 341 [5 Am. Dec. 616]; but that case is not supported by any other decision within our knowledge.

By Court. The judgment is affirmed, with five per cent. damages, and costs.

JACKSON v. CULLUM.

[2 BLACKFORD, 228.]

THE BEST EVIDENCE of which the nature of the case is capable must be given.

THE CONTENTS OF LOST INSTRUMENTS or records may be proved by parol.

ERROR to circuit court. Ejectment. Plea, not guilty. Verdict and judgment for the plaintiff.

Caswell and Starr, for the plaintiff.

Dunn, Lane and Stevens, contra.

SCOTT, J. On the trial of this cause in the circuit, after the plaintiff had proved a legal title in himself, the defendant offered parol evidence of an outstanding title, founded on a judgment, an execution, a levy, sale, sheriff's deed, and a return of execution, all destroyed by fire. This evidence was objected to by the plaintiff; but the objection was overruled, and the evidence was permitted to go to the jury; and this is the only error complained of.

On the subject of evidence the general rule is that the best attainable evidence shall be adduced to prove every disputed fact. The effect of this rule is, that when, from the nature of the transaction, superior evidence may be presumed to be within the power of the party, that which is inferior will be excluded. But when it is manifest that evidence of a higher degree is not within the power of the party, that of a lower degree will be received; and the general rule never excludes the best evidence which can then be produced: 1 Stark. Ev. 391. In conformity with this rule, it has been held that if a recovery in ancient demesne be lost, and the roll cannot be found, parol evidence may be resorted to: 1 Stark. Ev. 159. In the case of *Hills v. Colvin*, 14 Johns. 182, parol proof of a matter of record was excluded, on the ground that there was better evidence than within the power of the party. The case of *Jackson v. Frier*, 16 Johns. 193, was decided on the ground that due diligence had not been used in searching for the deed alleged to be lost. In both these cases it is stated that, on proof being made that better evidence was unattainable, parol testimony would have been admitted. In the case of *Hamilton's lessee v. Swearingen*, Add. 48,¹ parol evidence was offered to supply the place of a lost deed, but the court refused to receive it. It is there said that in some cases such testimony must be received from necessity, but it is of so

1. *Hamilton v. Van Swearingen*, Addis. (Pa.) 48.

dangerous a nature that necessity alone can justify its admission. The evidence in that case was offered by the plaintiff, who might have taken steps before he commenced his suit to restore his title. The situation of a defendant is not so favorable. It might not be in his power, after suit brought and before the trial, to have the title restored on which he rested his defense; and were this even practicable, such a proceeding might be dependent on the will of some other person, under whose title he found it necessary to protect himself. Without resting, however, on the distinction between the situation of a plaintiff and a defendant, we think the case of *Hamilton's lessee v. Van Swearingen* more than balanced by the doctrine clearly laid down in other cases, where the principles are founded on better reason, and tend more to the furtherance of justice.

In the case under consideration no doubt is suggested, and it is believed none exists, of the loss of the papers proposed to be supplied by oral proof; and if there can be any case in which parol evidence would be admitted to supply the loss of a deed or record, we can not easily conceive of one in which necessity would more strongly urge such a measure. We are, therefore, of opinion that the circuit court was correct in suffering the defendant's evidence to go to the jury.

By COURT. The judgment is affirmed, with costs.

RAY v. ROE.

[3 BLACKFORD, 268.]

PENDING OF AN ACTION OF SLANDER does not render a sale of the defendant's land void as to the plaintiff, though the defendant has no other property to satisfy the judgment subsequently recovered.

PENDING OF AN ACTION is constructive notice of the matter involved in the suit, and a purchaser of the property which is the immediate object of the pending action will be affected by it, as a purchaser with notice.

ERROR to the circuit court. Ejectment by Roe on the demise of Brown, against W. Ray and D. Ray. Plea, not guilty. Verdict and judgment for the plaintiffs.

Smith, for the plaintiffs.

McKinney, Morris and Perry, contra.

SCOTT, J. This was an action of ejectment in the Union circuit court. We have no information by what kind of title the lands in controversy were claimed by either party. The

only point referred to our adjudication is the correctness of the charge given by the court to the jury. The court instructed the jury that a transfer of property, made by a defendant during the pendency of an action of slander against him, and before the rendition of judgment, is of itself fraudulent, unless it be made in performance of a prior contract, or in payment of a precedent *bona fide* debt; that all purchasers are bound to take notice of the pendency of said suit; and that if a purchase be made during the pendency of such action, whether with or without consideration, it is considered fraudulent in law as to the judgment-plaintiff, unless there is other property sufficient to satisfy the judgment. To this instruction the defendants except.

On the broad ground that fraud vitiates all contracts, a conveyance made with design to avoid the payment of a just debt, or to defeat the recovery of a pre-existing right, is void as it respects creditors; and the pendency of a suit is one of the many badges of fraud which would induce a court of equity to set aside a conveyance, or a jury to regard it as a nullity, in a trial at law. The pendency of an action is constructive notice of the matter involved in that suit; and a purchaser of the property which is the immediate object of the pending action will be affected by it, as a purchaser with notice. But a *lis pendens* is not even constructive notice of any other points than those which are in dispute between the parties to such action: 3 Atk. 392; Newl. on Con. 506, 507. So much, then, of the instruction as states that a transfer of property, made during the pendency of an action for slander, is of itself fraudulent, whether with or without consideration; and that all persons are bound to take notice of the pendency of such action in the unqualified manner there expressed, is unsupported by authority. Not having the evidence before us, we can not say how far these instructions might tend to influence the verdict; but there is reason to presume that the jury might have been misled by them.

By COURT. The judgment is reversed, and the verdict set aside, with costs. Cause remanded, etc.

LIS PENDENS.—See *Newman v. Chapman*, 14 Am. Dec. 766, and note.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

SANDERS' HEIRS v. MORRISON'S EXECUTORS.

[T. B. MONROE, 54.]

TRUST ESTATE.—Upon the death of one of two trustees, the entire trust estate does not vest in the survivor, but a moiety of the same vests in the heirs or devisees of the deceased trustee.

IDEM—*JUS ACCRESCENDI* is destroyed by statute, in Kentucky, in trust estates, as well as in all others.

APPEAL from Owen circuit. The opinion states the case.

Monroe and Haggin, for appellants.

Griffenden and Wickliffe, contra.

By Court, **MILLS, J.** Morrison filed his bill on an adverse conflicting entry, to recover land against Sanders, who held the elder grant. The court below gave him the relief prayed, and from that decree Sanders appealed. Morrison and Sanders have both died pending the appeal, and the cause has been revived in the name of their respective representatives.

The appellants now question the title of Morrison, and their ancestor required proof of title in his answer.

The title set out by Morrison is an entry in the name of Andrew Shriver, a patent to the late George Nicholas, as assignee of Shriver, and the will of Nicholas, devising the land in fee to said James Morrison and Joseph H. Daviess, and in trust for the payment of his debts, and to be conveyed in portions to his wife and children.

The appellants except to the will as not approved either by a certificate from a recording office or by witnesses to be the will of Nicholas. We waive that question, as it may, in a future

stage of the cause, arise in another shape, because we are of opinion that the bill of Morrison, by his own showing, admitting the copy of the will to be genuine, which he has made part of the bill, shows such a defect of parties as proves conclusively that he is not entitled to the decree which he has obtained on the merits.

The devise in the paper relied on as a will, after appointing Morrison and Daviess as his executors, is to this effect: "I hereby give them the fee simple on my whole estate upon the following trust: that they shall permit my wife to hold my house and lots near Lexington, my farm near that place, and the negroes belonging to that farm, and one dwelling house and all the stock belonging to that farm, and every kind of personal property in or belonging to our dwelling house, wherever that may be situate at the time of my death, for her life; and that they convey the said property, after her death, to any child or children of ours that she may give it to by her last will, and that they pay her annually, during her life, the sum of five hundred dollars; that they sell so much of the rest of my estate which, in their judgment, can be best spared, to comply with my contracts, and pay my debts, and that they convey all the residue of my estate of every kind to all my children who shall attain the age of twenty-one years, or money in equal proportions; and this division is to be made at their discretion, either partially or of the whole residue at once, as will best suit the wants of my family and the situation of my debts; and my executors are to be the judges of the equality of the division, each child to have an estate in fee in the part to be allotted to him or her."

This will is dated May 3d, 1797, and has not one word in relation to the survivor taking the estate between the executors, and the vestiture is joint.

Morrison states in his bill that Daviess is dead, and that he is the sole surviving executor and trustee, and hence he would have it inferred that the trust estate survived to him, and the question is, can this inference be admitted? We conceive not. A moiety of the estate descended to the heirs of Daviess, or might have been devised by his will, if he made one; and, therefore, Daviess' heirs or devisees, as the case may be, were necessary parties to a suit of this nature to try the title of the land. With this agrees the decision of this court in the case of *Waggener v. Waggener*, 3 Mon. 542.

There is nothing to prevent a trust estate from descending or being devised. unless such transmission of the title be forbid-

den by the terms of the original grant to the trustees, and that is not the case in this will. In England, the case of joint trustees was different. The doctrine of survivorship which existed in that country would still keep the estate in the survivor. But here, since the destruction of the doctrine of survivorship, the case is different.

Knowing the inconvenience of spreading a naked trust of this kind into so many hands, by a descent or devise, we have resorted to the act of assembly, 2 Dig. L. K. 686, to discover whether we could not make a trust of this nature an exception to the general rule of destroying survivorship between joint tenants; but in this resort we have been disappointed, and that act is express and decisive in all cases, even in joint trust estates, and is conclusive against the appellee, and precludes his escape. Survivorship is there taken away between all joint tenants, "whether they be such as might have been compelled to make partition or not, or of whatever kind the estate or things holden may be." It therefore expressly includes unlimited trusts as this, and leaves the title to pass to the representatives of the one dying, to be held in common with the survivor.

The decree must therefore be reversed with costs, and the cause be remanded to the court below, with directions there to dismiss the bill with costs, and without prejudice, unless the proper parties are brought before the court in a reasonable time, to be fixed by the order of the court below.

A petition for a rehearing by the counsel for the plaintiffs in error was denied.

BIBB, C. J., absent.

See as to when a trust vests in the survivor of two trustees and the powers of such survivor, note to *Osgood v. Franklin*, 7 Am. Dec. 525. See as to when trust powers can not be delegated, note to *May v. Frazee*, 14 Am. Dec. 170.

SURVIVORSHIP—CO-TRUSTEES.—The principal case is in harmony with the case of *Boston Franklinite Co. v. Condit*, 19 N. J. Eq. 398; but generally the statutes abolishing or discouraging joint tenancy are not so construed as to operate upon grants made to two or more persons as trustees. The rule supported by the majority of the American decisions upon this subject, and the reasons assigned for its support, are thus stated in section 43 of Freeman on Cotenancy and Partition: "Some of the statutes enacted in the various states for the purpose of abolishing or discouraging joint-tenancy, or of robbing it of its grand incident of survivorship, except from their operation estates granted or devised to two or more as trustees. But, independent of any express exception, it has been generally, but not universally, decided that these statutes do not apply to estates held in trust. The object of the statutes was to prevent the vesting of the whole estate in one of the co-ten-

ants to the exclusion of the heirs of the other. It was thought best to change the rule of the common law so that the co-tenant's heirs, who were supposed to be dear as well as near to him, and who had the strongest claims to his protection and to such advancement as might be obtained from his estate, should not be, in effect, disinherited, in the absence of some express stipulation in the deed by which the estate was created, clearly indicating that it was taken subject to the hazard of survivorship. But when lands are granted to two or more persons to be by them held in trust, they have no beneficial interest in the grant. If either die, the vesting of the entire legal estate in the other as survivor has no tendency to operate to the prejudice of those interested as beneficiaries. No children are, in effect, disinherited for the advantage of a stranger. The party creating the trust can hardly be supposed to have designed it to be held as a tenancy in common; for if so held, the death of either trustee, and the consequent descent of his legal estate to his heirs, would necessarily devolve, in part, the management of the trust upon persons who were strangers to the trustor, and upon whom he never thought of calling for its execution. The trustor, it may well be presumed, intended that *all* the trustees should join in effectuating the trust; but when, from death, one of them can no longer act, the trustor's designs will probably be better accomplished by regarding the remaining trustees as being exclusively charged with the administration of the trust, than by introducing the heirs of the deceased or an appointee of some court to represent the late trustee and to participate in the management of the trust estate. Because the mischiefs which these statutes were intended to avoid never worked as mischiefs, but rather as advantages in connection with estates held by trustees, these estates are regarded as beyond the scope and intent, and therefore beyond the operation of the statutes, and are to descend to the survivor or survivors, and in other respects to be treated as at common law." Citing *Parsons v. Boyd*, 20 Ala. 118; *Powell v. Knox*, 16 Id. 364; *Gray v. Lynch*, 8 Gill. 423; *P. and R. R. Co. v. L. N. Co.*, 36 Pa. St. 204; *Schatts v. Unanget*, 3 Watts. & S. 45; *Stewart v. Pettus*, 10 Mo. 755.

SPROULE v. WINANT'S HEIRS.

[7 T. B. MONROE, 195.]

DEED—CONSIDERATION.—A deed executed in pursuance of a bond for a deed, to an assignee of the bond, should express the consideration received by the obligor, and not that paid by the assignee; and upon the failure of the title, the measure of damages will be the value of the land, as fixed by the consideration received by the obligor.

IF A BOND FOR LAND is to the wife, the deed should be to her, and not to the husband.

SPECIFIC PERFORMANCE, HOW DECREED.—In a decree for specific performance, the same should be final for a conveyance, and if not complied with, a decretal order appointing a commissioner to execute the decree, should be entered.

A PERSON WHO COVENANTS TO CONVEY, as soon as he gets the title from another, must show that he has attempted to obtain that title.

ERROR to the Madison circuit. Bill for a specific performance. The opinion states the case.

Turner, for plaintiffs.

Caperton, contra.

By Court, OWSLEY, J. Absalom Bridges gave his bond or covenant, without penalty, to convey a tract of land to William Miller and Ralph Lilburn. Lilburn assigned this bond, or his interest therein, to his co-obligee, Miller; Miller assigned the whole bond to Oliver Sproule. Sproule gave his bond to convey the same land to the heirs of John Winant, naming each heir, and bound himself to make the title, so soon as he could get a title to the land from Absalom Bridges.

The heirs of Winant filed their bill to compel a conveyance, and charge the title to be in Bridges; and that Sproule never took any steps to get it from Bridges, for the purpose of fulfilling his contract with them. Sproule answered, insisting that he has not forfeited his bond, because he never could get a title from Bridges, in which event he was to convey. The court below decided in favor of the complainants, and various exceptions are taken to the decree by the assignment of error.

It does not appear what consideration passed from Miller and Lilburn to Bridges for the land. The bond imports a valuable consideration, but how much is not manifest from the bond, or any part of the record. The consideration which passed from the complainants to Sproule, does appear.

The court decreed that both Bridges and Sproule should unite in a joint conveyance of the land, the deed expressing the consideration which passed between the complainants and Sproule. This is incorrect; for the consideration for which Bridges ought to be bound, may be far less than that between the complainants and Sproule; and as the complainants have not shown it to be as great, and have contented themselves without ascertaining what it is, it follows that Bridges ought to be directed to convey to Sproule by deed, with general warranty, reciting the sale bond which he had made, and the bond which he had given as the consideration, leaving the precise sum open, and subject to inquiry, if at any time hereafter Bridges shall become liable to an action on the warranty. The warranty, it is true, after the conveyance of Sproule to the complainants, will belong to them; and in case of eviction, they may sue on it, as assignees thereof, instead of bringing their action against Sproule on his warranty. But in said action the value of the land as fixed by the consideration between Bridges and Lilburn and Miller, will be the proper criterion of damages, and not that fixed between Sproule and

the complainants. While the bond of Bridges was in the market, and passed from assignor to assignee, each assignee must be understood to have agreed to take a conveyance according to the consideration passing from obligee to obligor, instead of that passing from assignee to assignor. It follows, therefore, that Bridges ought to be compelled to convey to Sproule, according to the consideration which he has received, and Sproule to the complainants, according to the consideration given to him, and it was erroneous to direct a joint conveyance.

It may also be remarked that the conveyance to some of the female complainants has been directed to be made to their husbands, when the bond was to them alone. The conveyance ought to be directed to the wife only, leaving the husband to take his right under the marriage.

The court, instead of decreeing that the parties should convey by a final decree, and then afterward, on their failure, appointing a commissioner, if applied for by a decretal order, has fallen into a common error, of which we have had often to complain. The decree was made interlocutory, and directed the defendants to convey by a certain day, and if they failed, a commissioner should convey, leaving with the commissioner the right to judge of the failure. The court then retained the cause till the commissioner ascertained the failure, and reported the conveyance, which the court approved, and then made a final decree settling the costs.

Sproule complains that he was charged with costs, when Bridges never conveyed to him, and he was only bound to convey when Bridges conveyed. We do not see how to release him from costs. He was bound to convey so soon as he could get a title from Bridges. He has not shown that he attempted to get one, or that there was any obstacle to his getting one if he had tried it.

Decree reversed, with costs, and cause remanded for such decree and proceedings to be had as shall conform to this opinion.

CONSIDERATION RECITED IN A DEED, when may be contradicted: *O'Neale v. Lodge*, 1 Am. Dec. 377; *Schemerhorn v. Vanderheyden*, 3 Id. 304, note 306; *Graves v. Carter*, 11 Id. 786, note 787; *Chiles v. Coleman*, 12 Id. 396, note 401.

SPECIFIC PERFORMANCE is often within the discretion of the court: *Seymour v. Delancy*, 15 Am. Dec. 303, note; and is generally refused if the consideration is inadequate: Id. 299, 304. Also, if the complainant can not fully perform on his part: *McKean v. Reed*, 12 Am. Dec. 324, note.

SANDERS v. VANCE.

[7 T. B. MONROE, 209.]

PRACTICE.—A demurrer being sustained to a declaration containing but one count, and a new count being added as an amendment, to which a plea of not guilty was entered, it was held that the plea applied to the new count only.

FERI FACIAS—JUSTIFICATION OF LEVY.—To justify a levy upon property as belonging to a person alleged to have conveyed the same to defraud his creditors, the judgment upon which the *feri facias* issued must be produced.

A MORTGAGEE MAY MAINTAIN TROVER against the sheriff and the plaintiff in execution, for seizing the mortgaged property under a *feri facias* issued against the mortgagor.

IN TROVER THE MEASURE OF DAMAGES is the value of the property at the time of the conversion, with interest to the date of the trial, in the discretion of the jury.

ERROR to the Fayette circuit. Case. The opinion states the case.

Chinn, Haggin and Loughborough, for plaintiff.

Wickliffe, contra.

By Court, OWSLEY, J. This writ of error is prosecuted by Sanders to reverse a judgment recovered against him in an action on the case, which he brought in the circuit court against Vance.

The declaration of Sanders, as originally drawn and filed, was demurred to by Vance, and the demurrer being joined by Sanders, was sustained by the court. The declaration so demurred to contains but one count, but Sanders obtained leave of the court, and filed an additional count by way of amendment to his declaration. This latter count is in trover for the conversion of fifty milch cows of the value of one thousand dollars, fifty heifers and steers of the value of one thousand dollars, fifty horses of the value of one thousand dollars, and divers pieces of household and kitchen furniture, consisting of beds, carpets, chairs, tables, table-cloths, chinaware, pots and kettles, of the value of one thousand dollars.

Not guilty, was pleaded by Vance, but as the court had adjudged the first count of the declaration, to which there was a demurrer, bad, and as that demurrer was not withdrawn, the plea is understood to apply to the latter count only, so that it will not be necessary to take any further notice of the first count, or the decision of the court thereon.

A trial of the issue was had by a jury, and a verdict of one thousand six hundred and seventy-two dollars and eighty cents damages was found against Vance, but on his motion the verdict of the jury was set aside by the court, and a new trial awarded. Exceptions were taken to the opinion of the court in awarding the new trial, and the whole of the evidence made part of the record.

At a subsequent term of the court the issue was again tried, and a verdict found by the jury in favor of Vance. A new trial was then moved for by Sanders, but his motion was overruled and judgment rendered against him on the verdict. Exceptions were also taken by Sanders to the refusal of the court to award him a new trial, from which it appears that the same evidence was given to the jury at the last trial that was at the first, and that the same instructions were also given by the court to the jury at both trials.

It is to reverse this judgment rendered on the last verdict that Sanders has brought this suit of error. It is contended by him that the court erred at both trials in instructing the jury, and that the last verdict should have been set aside, but the first ought not to have been, and that judgment should have been rendered in his favor on the verdict first found by the jury.

It is proper that our attention should be first directed to the first trial to ascertain whether, in setting aside the verdict then found for Sanders, any error was committed by the court. For, if in setting aside that verdict the court erred, it follows, from the repeated decisions of this court, that all the subsequent proceedings are erroneous, and of course the judgment which is rendered upon the last verdict can not be permitted to stand.

To form a correct opinion as to the propriety of setting aside the first verdict, it is necessary to understand the material facts which the evidence given to the jury went to prove. They are briefly and substantially these: While the owner and possessor of the articles of property mentioned in the declaration, with others, Lewis Sanders, under a promise previously made to his brother (the plaintiff), executed a deed of mortgage thereof to him, for the purpose of indemnifying his brother against debts for which he had become bound to others as his surety. At the time the mortgage bears date, it was not delivered by Lewis Sanders, nor was his brother present at its execution; but before the expiration of the time required by law for recording such instruments, Lewis Sanders went to the office of the clerk of the court of the county in which he resided; presented the

mortgage to the clerk, acknowledged it, and left it with him to be recorded. Before this time, however, Lewis Sanders had been taken in execution by the sheriff, under a *ca. sa.* in favor of other creditors; and he was at the time, not only actually in the custody of the officer, and indebted beyond his means of payment, but was afterwards discharged from imprisonment, on taking the oath of an insolvent debtor. The whole of his property, or mostly all of which he was then possessed, was comprehended by the mortgage, and he continued in the possession thereof, until that part of it, now the subject of contest, was taken by the sheriff of Fayette county, under a writ of *fi. facias*, which issued from the office of the circuit court of that county, in favor of Vance. The levy was made by the directions of the agent of Vance, and, after the sale, the proceeds thereof was paid to the agent, and a return made on the writ of *fi. facias* in favor of Vance accordingly. The property was claimed by Sanders, the mortgagee, at the day of sale, and for his security. The sheriff summoned a jury to inquire into the right. The jury disagreed, and by agreement between the agent of Vance and Sanders, the mortgagee, the sale was to proceed, with an understanding that Sanders should pursue his redress, not against the purchasers, but against Vance or the sheriff. The *fi. fa.*, under which the property was taken and sold, was used in evidence; but it does not appear that either the judgment, or a copy thereof, upon which the *fi. fa.* issued, was introduced. These are the prominent facts, proved on the trial, and upon which, in connection with evidence of the value of the property sold, instructions were given to the jury, and a verdict of sixteen hundred and seventy-two dollars and eighty cents damages was found by them.

By the instructions of the court, the jury were told, that if they should find from the evidence, that the defendant, in person, or by agent, caused the execution, under which the sheriff acted, to be levied upon, and a sale made of the property which had previously been mortgaged to the plaintiff, in good faith, to secure a just debt due to him, and to indemnify him against securityship, the plaintiff has a right to recover the value of the property, with interest thereon, from the time of sale: Provided, the deed of mortgage, under which he claims, is not fraudulent; but if Lewis Sanders, the mortgagor, was indebted, and in the prison bounds, under the execution of any of his creditors, when the mortgage took effect, and all of his property which was unincumbered, and subject to execution, is con-

tained in the mortgage, and at the time it was made the mortgor contemplated the oath of an insolvent debtor, the deed of mortgage is fraudulent and void in law against creditors and purchasers; and that the plaintiff is not entitled to recover the value of any of the property therein contained, of the defendant, if sold under her execution against Lewis Sanders.

Whether or not the conclusions of law in every particular were correctly drawn by the court upon the facts assumed, and on the truth of which the instructions to the jury were predicated, is not necessary now to be examined and decided. By failing to produce, at the trial, the judgment on which the execution in her favor against Lewis Sanders issued, and under which the property was sold by the sheriff, or a copy thereof, the defendant was undoubtedly not in a condition to attack the mortgage from Lewis Sanders to the plaintiff, on the ground of its being fraudulent as to the creditors and purchasers of the mortgagor, and thereby defeat the recovery by the plaintiff in this action.

The law was so ruled by the court in the case of *Lake v. Bilks*, 1 Ld. Raym. 733. This was an action of trespass brought against the sheriff for goods taken. Upon not guilty pleaded, the sheriff gave in evidence that he levied them in execution, by virtue of a *fiery facias*. The plaintiff made title to the goods by a prior execution, but fraudulent; and by bill of sale made of them to him by the officer, viz., the sheriff, predecessor of the defendant. It was ruled by the court that the defendant, though sheriff, ought to give in evidence a copy of the judgment, though it was admitted that it would have been otherwise if the action had been brought by the person against whom the *fiery facias* issued.

The same doctrine was admitted and approved by Lord Mansfield in the case of *Martin v. Padger*, 5 Burr. 2633,¹ and has been recognized and followed by this court in various cases.

The defendant not being, therefore, in a condition to attack the mortgage, on the ground of fraud, it would seem that she can have no good cause to complain of the jury having disregarded the instructions of the court, as to the mortgage being fraudulent or otherwise as to creditors or purchasers of the vendor, that being a point totally abstract and irrelevant to the matter presented for the determination of the jury. Without, therefore, pursuing and revising the opinion of the circuit court on abstract and impertinent points, we shall proceed to

1. *Martyn v. Padger*, 5 Burr. 2631.

inquire whether, in any material point, the court erred in its instructions, to the prejudice of the defendant.

The objection taken to the form of action has no weight with us. That trespass will lie against the sheriff, or against the sheriff and plaintiff, or against the plaintiff alone, provided the plaintiff assists the sheriff, in favor of one whose property is taken and sold under an execution against another, is as firmly settled, by a train of adjudications both in England and America, as perhaps any other principle of the common law; and if trespass might have been maintained, no reason is perceived why trover will not lie. To recover for the injury occasioned by the original taking, trespass is, no doubt, the proper action; but the plaintiff generally has the right to waive the original trespass, and bring trover for the conversion of the property taken; and no reason is discerned, nor principle of law known, which takes the case of trespass committed by an officer, under color of process, out of the general principle.

But the instructions of the court go, not only to sustain the action, but, according to our understanding of them, they import a decision that, as matter of law, the plaintiff, in an action of trover, has the right to recover, and the jury are bound to assess damages equivalent to the value of the property converted, and interest from the time of conversion to the trial. Now, it will not be denied but that the jury may, in their discretion, give damages equal to the value of the thing converted, and interest; but we know of no law that gives interest as matter of right in such cases, nor are we apprised of any rule of law that limits and fixes unalterably the discretion of the jury in their assessment of damages in such an action. The amount to be assessed for damages, above the value of the thing converted, must, therefore, of necessity, lie within the discretion of the jury, so as not to be made by them to exceed the legal rate of interest, and of course the court should not, as matter of law, have fixed the amount of damages by its instructions. For this error in the instructions, it can not, therefore, have been incorrect for the court to set aside the first verdict, and award a new trial.

With respect to the last verdict, we also think it should have been set aside. On that trial, the defendant also failed to produce the judgment, or a copy upon which the execution issued in her favor, and therefore, as we have seen, she could not raise the question as to the mortgage being fraudulent, and if

not fraudulent there is no pretext for supporting the verdict which was found by the jury in her favor.

The judgment must, consequently, be reversed with cost; the cause remanded to the court below; the last verdict there set aside, and further proceedings had, not inconsistent with this opinion.

JUDGMENT MUST be produced to support a sale thereunder: *Dufour v. Camfranc*, 13 Am. Dec. 360; note, 365.

See, as to the measure of damages in trover: *Woolley v. Carter*, 11 Am. Dec. 526; note, where all the authorities are collated, and the question elaborately discussed.

GENTRY v. HUTCHCRAFT.

[7 T. B. MONROE, 241.]

LOST PAPERS.—ORAL PROOF MAY BE RECEIVED and recorded at a term subsequent to which a judgment was entered, showing the loss of process and the nature of the sheriff's return thereon, for the purpose of upholding a judgment.

EXHIBITS IN CHANCERY, WHICH ARE LOST OR MISLAID after the decree, may be supplied at a subsequent term.

AMENDMENTS AFTER WRIT OF ERROR.—If, during the pendency of a writ of error, proof is made by the defendant in error, to the court of original jurisdiction, of the existence and loss of the process and sheriff's return, the absence of which is the only error assigned in the appellate court, upon such proof being certified to the latter court, the judgment will be affirmed.

ERROR to the Madison circuit. The opinion states the case.

Turner and Caperton for plaintiffs.

Breck, contra.

By Court, OWSLEY, J. Hutchcraft filed in the clerk's office of the Madison circuit court a petition against James H. Gentry and David Gentry, accompanied with their note to him for the payment of \$442 68.

On the eighteenth of February, 1824, the clerk issued a summons in favor of Hutchcraft, upon the petition, against both the Gentrys, returnable to the March term of the court thereafter. The summons was returned by the sheriff, "Executed on James H. Gentry the twenty-sixth of February, 1824, by delivering to him a copy of the within petition and summons, and David Gentry not found."

At the March term, 1824, an order was made "that the cause

be continued and that an alias process issue, returnable to the next term of the court."

At the June term no entry was made in the cause, there being, as the clerk certifies, no court at that time.

At the September term the cause was called, and the Gentrys failing to appear, judgment was rendered against them for the amount of the note mentioned in the petition, together with interest and cost. To reverse that judgment, the Gentrys have prosecuted this suit of error with *supersedeas*.

The alias summons which was ordered by the court to issue at the March term, is not contained in the original transcript of the record filed in this case, nor does it appear from anything contained in that transcript that the alias summons ever issued, or that any process was served upon David Gentry, one of the defendants in the circuit court, before judgment.

It is assigned for error by the Gentrys, "that the court erred in rendering judgment against them, no process having been served upon David Gentry." Tested by the original transcript of the record, the judgment undoubtedly could not be sustained. To have authorized the judgment, both of the Gentrys should have been served with process, and by the original transcript there appears to have been no process served upon David Gentry. But it being suggested, on the part of Hutchcraft, that there was a defect or diminution in the original transcript of the record, a certiorari was ordered to the clerk of the circuit court to supply the defects in the transcript. The certiorari has been returned, accompanied with an additional transcript, certified by the clerk to be a correct copy of proceedings had at the March term, 1827, on notice and motion by Hutchcraft, as the same remains in his office.

By this additional transcript it appears that in pursuance of notice given to the Gentrys for that purpose, Hutchcraft moved the circuit court of Madison, at the March term, 1827, and obtained an order not only certifying, but containing the evidence upon which the order was made, "that satisfactory proof was made to the court that in the case of *Hutchcraft v. James H. Gentry and David Gentry*, petition and summons formerly in this court, and in which judgment was rendered at the September term of this court, 1824, and which case is now pending in the court of appeals, an alias petition and summons was regularly issued by the clerk of this court on the fourth of May, 1824, directed to the sheriff of Madison county, and that a copy thereof was duly served upon the defendant, David Gentry, by

a deputy sheriff of said county of Madison, on the twenty-second day of May, 1824; and that said alias, with the proper return of the said sheriff thereon, and of which the following is a copy, to wit:” [Here follows a true copy of the original petition in this case, and alias summons thereon, returnable to the June term, 1824, and upon the summons is the following return of the sheriff: Executed on the twenty-second of May, 1824, by delivering a copy of the within petition and summons to the within defendant, David Gentry], “was duly filed with the papers in said suit, in said clerk’s office, when said judgment was rendered, and that the same has since been lost or mislaid, so that the same can not now be found in said office.”

The evidence contained in the transcript, and upon which the order appears to have been made, is in part written and part oral. The written evidence consists of an entry in a memorandum book of the office of the clerk, in the following words: “Fourth of May, 1824. *Hutchcraft v. Gentrys*, alias. Petition and summons issued.” An indorsement on the docket of the June term, 1824, opposite the suit of *Thomas Hutchcraft v. James H. and David Gentry*—petitions and summons: “Alias issued;” and in the place where the sheriff’s returns are entered: “Ex’d twenty-second May, 1824.”

The oral evidence consists of the testimony of the clerk, his deputy, the deputy sheriff, and the attorney who prosecuted the suit for Hutchcraft, all of whom concur in proving conclusively that the alias summons not only issued, but was actually served upon David Gentry, according to the import of the written memorandum, and that it was in fact returned executed, and was with the papers of the cause at the time judgment was rendered by the circuit court, but the same is now lost or mislaid, so that it can not be found.

If it be possible to supply the loss of the summons and sheriff’s return thereon by proof in the court of original jurisdiction after the term is over at which judgment is rendered, and if it be possible by such proof, and the order of the court made thereon, to uphold the judgment rendered in a case in which the process is lost; the present would, therefore, from the transcript brought up by the certiorari, seem to be such a case. Is it then competent in any case to supply the loss of process; and may the judgment, notwithstanding such loss, be upheld by proof afterwards made in the court of original jurisdiction and the order of the court thereon? The questions

have, we apprehend, in effect been answered in the affirmative, by the former decisions and practice of this court.

In the case of *Craig v. Horine*, 1 Bibb, 8, a question arose whether it was practicable, and if practicable, how it should be done, to supply the absence of certain exhibits which were necessary to make out the complainant's title, and which had been used on the trial in the court below, but which had been mislaid or lost out of the papers since the trial in that court, and not contained in the transcript of the record certified by the clerk.

The court, after maturely deliberating on the consequences which might follow from any rule which might be adopted, came to the determination that the absence of the exhibits might be supplied, but that it must be done by application to the court that tried the cause. After the decision in that case by this court, application was made to the court of original jurisdiction in which the cause had been decided, to file the absent exhibits, and permission was accordingly given to the applicant to file them. The exhibits were then brought up to this court by certiorari; and though objected to as not composing part of the record of the original cause, the objection was overruled, the admission of them by the court of original jurisdiction approved, and they were considered and acted upon by this court as part of the record, in the case: 1 Bibb, 113. The same rule has since been followed and repeatedly acted on in subsequent cases.

It is true, no case has hitherto occurred in which it became necessary to decide on the application of the rule to lost process; but if it be correct to allow lost exhibits to be supplied, no reason is perceived why lost process may not also be supplied in the same manner. Exhibits which are with the papers of a chancery cause at the hearing, are as much a part of the record as any process can be; and if, in respect to exhibits which are lost, the defect of record may be supplied and corrected by after application to the court by whom the cause was decided, it would seem to follow that the defect in the record occasioned by the loss of process may also be supplied and corrected in the same way.

It follows, therefore, that according to the record, as it now appears from the return to the certiorari, that both of the Gentrys, who were defendants in the court below, were regularly served with process before judgment was rendered against them, and that the judgment must consequently be affirmed

and that, too, with costs and damages, as was done in the case of *Speed's executors v. Hann*, 1 Mon. 16 [15 Am. Dec. 78], upon affirming the judgment which had been superseded for an error apparent in the original transcript of the record, but which had been corrected after the cause was in this court, by an amendment made in the court of original jurisdiction.

AMENDMENTS AFTER APPEAL.—See, for a discussion of this question, the note to *Res v. Barker*, 14 Am. Dec. 516.

YOUNG v. WISEMAN.

[7 T. B. MONROE, 270.]

MORTGAGE, WHEN BARRED BY ADVERSE POSSESSION.—Adverse possession of personal property for the statutory period, vests the title thereto in a vendee of the mortgagor without actual notice of the mortgage, although he may have constructive notice thereof; and such possession is a bar to a suit to enforce the lien of the mortgage.

APPEAL from the Fayette circuit. Bill in chancery. The facts are stated in the opinion.

Crittenden and Wickliffe, for appellant.

Chinn, contra.

By Court, **MILLS, J.** About the last of May, 1815, John D. Young bought of the executors of Hezekiah Harrison two slaves for seven hundred dollars, and gave his note for the price, with William D. Young as surety, payable in one or two months. At the time of payment John D. Young failed, and William D. Young, his surety, then agreed to take the slaves from John, and to pay their price. He accordingly did so, and John D. Young made him a bill of sale absolutely, warranting the title to the slaves against all persons except Robert Wickliffe, to whom John D. Young had executed a mortgage for about the sum of four hundred dollars; and he took possession of the slaves, and paid off and discharged the mortgage of Wickliffe, and continued to hold them undisturbed for about seven years.

Wiseman, the appellant, then filed his bill, setting up against these slaves a mortgage executed to him by John D. Young, dated after the mortgage to Wickliffe and before the date of the sale to William D. Young, and praying a foreclosure and sale of the slaves.

Besides other grounds of defense which need not be noticed, William D. Young sets out his bill of sale from John D. Young,

with warranty against all but Wickliffe, whose claim he has extinguished. He denies notice or knowledge of the mortgage of the complainant, insists on his adverse possession, and pleads and relies on the statute of limitations to bar the recovery.

The court below took an account of the hire of the slaves while William D. Young held them, and having ascertained that the hire exceeded the amount of Wickliffe's mortgage, refused to allow to William D. Young the amount of the original purchase-money, and decreed a foreclosure of the equity of redemption and a sale of the slaves. From this decree William D. Young has appealed.

The most important question is, What effect is the statute of limitations to have? It was held in Virginia, *Ross v. Norvell*, 1 Wash. 14 [1 Am. Dec. 422], that the statute of limitations of five years did not apply between mortgagor and mortgagee of slaves, and that twenty years was necessary. But this is on account of the trust existing between the parties, and it is admitted in the same case that although the statute will not run between trustee and *cestui que trust*, it nevertheless will do so between the trustee and strangers. And in the case of *Harrison v. Harrison*, 1 Call, 428, it is expressly held that the statute will run against the trustee in favor of disseisors and tortfeasors holding adversely to both.

The rule is also well settled by Chancellor Kent, in *Kane v. Bloodgood*, 7 Johns. Ch. 90 [11 Am. Dec. 417], and *Roosevell v. Mark*, 6 Johns. Ch. 266, that time does not run in the case of mere technical trusts, the creatures of a court of equity. But where the trust is constructive only, or is cognizable at law as well as equity, the statute can in general be pleaded, either in equity or at law, where there has been an actual possession. The condition of the mortgage of the complainant was forfeited more than five years when he brought his bill. If William D. Young had gotten this property by tort or trespass, there is no doubt he could protect himself by the lien of five years. Why, then, should he be in a worse situation when he has come by it honestly and innocently? He was driven into a purchase by the failure of John D. Young, his principal, to pay the price, and had to give the additional price of Wickliffe's mortgage. Had he known of the mortgage of the complainant, and been assured that he must lift that also, he never could, acting with ordinary prudence, have been willing to have bought the slaves. To pay their price, and then both mortgages, would have been worse than losing the price altogether. The presumption is,

therefore, strong in favor of his answer, that he did not know of the mortgage in question, and he took the slaves, holding them adversely against all except Wickliffe. If he had taken these slaves by violence, the statute would have shielded him; if he has been deluded into the purchase by the mortgager, ignorantly and innocently, the statute will protect him.

It is true the mortgage of the complainant has been recorded. But this, although it may force upon William D. Young constructive notice, so that the title he acquired could not be good without the statute in his favor, yet this constructive notice does not prevent the operation of the statute, provided the possession is such as the law calls adverse.

We therefore conceive that the statute is a bar in equity, as it would have been at law, if this was a legal action.

The decree of the court below is, therefore, reversed with costs, and the cause remanded with directions to dismiss the bill with costs.

See generally as to what constitutes adverse possession: *Trotter v. Casady*, 13 Am. Dec. 185, note.

MCGOWAN v. MANIFEE.

[7 T. B. MONROE, §14.]

SLANDER—ACTIONABLE WORDS.—Words are not to be taken in their mildest or most grievous sense, but in that sense in which they would be understood by those who heard them, and expressions of suspicion, or opinion, may amount to slander.

IDEM—COLLOQUIUM.—The words spoken need not designate the person, this may be done by the colloquium.

EVIDENCE.—Injunction of secrecy by the defendant to a witness, is no reason why such evidence should not be admitted to show the publication of slanderous words.

ERROR to the Bath circuit. Slander. The opinion states the case.

Chiles, Haggin and Loughborough for plaintiff.

By Court, BIBB, C. J. The first, second, and third counts state a colloquium between the plaintiff and one Charles Day, of and concerning a charge which had been made against the plaintiff, of stealing bank notes from Bryan & Co., in which the plaintiff was interrogating said Day, whether he had made such charge against him of stealing the money. The first count, in reference to this colloquium, states that the defendant said,

"You did take it." The second count charges that the defendant said, in reference to said colloquium and to the plaintiff, in presence of divers persons, "I suspect you;" the third count charges that the defendant said, in reference to said colloquium and to the plaintiff, "I suspect you of taking it."

The court instructed the jury to disregard these counts as being insufficient. Without the colloquium, the words charged in these counts would be unintelligible; but if spoken as alleged, in reference to the subject of the conversations between the plaintiff and Day, then they did import a charge of felony, and were actionable.

The fifth count charges that the defendant spoke of and concerning the plaintiff, these words: "He stole a large sum of money of Joseph T. Bryan, and that the defendant would waylay and search the plaintiff on his way to Flemingsburg." The seventh count charges, that the defendant, in speaking of and concerning the money which Bryan had lost, did publish of and concerning the plaintiff, these words: "He stole the said money of said Bryan, and the defendant would waylay and search the plaintiff, on his way to Flemingsburg." These counts were also declared by the judge to be insufficient, and the jury were instructed to disregard them.

The decision of the court was probably influenced, as to these latter counts, by the determination in *Barham's case*, 4 Co. 20. But the cases of *Hume v. Arrasmith*, 1 Bibb, 165 [4 Am. Dec. 626], and *Logan v. Steele*, Id. 593 [4 Am. Dec. 659], will furnish the reasons for not applying the old and rigid rules, which formerly required that the words themselves spoken should designate the person, and contain a direct charge of felony. Words are to be taken neither in the milder, nor in the more grievous sense, but in that sense in which they would be understood by those who heard them; the judge ought not to torture them into a charge of guilt, nor explain them into innocence, contrary to their obvious import.

With respect to all these counts so withdrawn from the jury, the cases of *Logan v. Steele*, and *Hume v. Arrasmith*, will be found to contain a refutation of any objection to either, because the expressions were only of suspicion or opinion, and not positively charging a felony, or because the name of the plaintiff was not mentioned.

The court excluded the testimony of George Owings, because of the confidence and friendship which had existed between the witness and the defendant from their childhood, and because

the conversations detailed were desired by the defendant not to be mentioned, for fear the plaintiff would get intimation of the defendant's plan of having the plaintiff searched for the stolen money, on his way to Flemingsburg. The testimony of Bryan, the owner of the store, and person from whom the money had been stolen, after being detailed, was, on motion, also excluded, because the defendant was the clerk and servant of said Bryan. The testimony of Charles A. Day was excluded on motion of defendant, because the frequent expressions by the defendant, as to his suspicions and belief that the plaintiff had stolen Bryan's money, were never, to his recollection, made openly in the street, but only in the store and at Bryan's house, and because this witness and the defendant were both clerks in the store of Bryan. That the judge erred in these several opinions hardly need be said. The communications made to these witnesses severally by the defendant, were of a slanderous character, as charged in the declaration; they were not made by the defendant to his counselor and attorney-at-law, nor under any such circumstances as the law regards as sacred and inviolable.

The bill of exceptions, in addition to the statements which had been made by those three witnesses, whose testimony had been so heard and excluded, proceeds to state the testimony of Mr. Jeremiah Spurgin, and of Mr. Fisher. After these witnesses were examined, the testimony of the witnesses, Owings, Bryan, and Day, having been, as aforesaid, excluded, "the defendant moved the court to instruct the jury to find, as in case of a nonsuit, on the ground that the foregoing evidence was insufficient to support any one of the counts in the plaintiff's declaration, which instruction the court gave, to all of which decisions the plaintiff excepts." The testimony of Spurgin and Fisher detailed very slanderous charges, made by the defendant against the plaintiff, which were more precisely applicable to those counts which had been excluded from the consideration of the jury, but were also applicable to the sixth count. It would be tedious to detail all the evidence given by the five witnesses. Suffice it to say, that they did prove the slanderous words substantially, as charged in the declaration, and in manner and under circumstances which could leave no doubt as to the obvious meaning of the defendant, to charge upon the plaintiff that he had stolen Bryan's money.

The plaintiff has declared for a grievous slander; he proved it on the defendant by five witnesses; it was circulated in an in

sidious manner, and repeated at various times; but after all, by a series of blunders, the case has been arrested from the jury by the court, and upon the plea of not guilty, the defendant has judgment against the plaintiff for costs.

It seems to this court that the circuit court erred in each and all of the opinions set down in the bills of exceptions taken by the plaintiff. It is, therefore, considered by the court that the judgment of the circuit court be reversed, and that the case be remanded for a *venire facias de novo*.

Plaintiff to recover his costs.

COLLOQUIUM, definition and office of: *Van Vechten v. Hopkins*, 4 Am. Dec. 348.

SLANDER, how proved: *Wheeler v. Robb*, 12 Am. Dec. 246; note, not necessary to prove the identical words: *Estes v. Antrobus*, 13 Am. Dec. 496; note, 497.

GRAVES v. MOORE.

[7 T. B. MONROE, 341.]

PROMISSORY NOTES—SUBJECT TO WHEAT CREDITS.—A credit once made on a note, but subsequently erased, is evidence, and the obligor is entitled to the benefit of the same, unless disproved or explained, and evidence showing that the money was actually paid as stated in the erased credit is admissible.

ERROR to the Lawrence circuit. The facts appear from the opinion of the court.

McConnell, for plaintiff.

Triplett, contra.

By Court, OWSLEY, J. This writ of error is prosecuted to reverse a judgment recovered by Moore & Burton, and on the trial in the circuit court of an appeal, which was prayed by them, from a decision of a justice, on a warrant brought by them against Graves.

The matter in contest relates exclusively to a credit of \$20, which Graves contends was paid by him to Moore, and which he insists was once indorsed upon the note sued on; but afterwards, without his assent, was erased from the note by Moore.

On the trial, which was had in the circuit court without pleadings in writing, after the note was read to the jury, an indorsement thereon was also read, in the following words: "Cr. by cash rec'd, \$20.00 c. July 16, 1823." But the indorsement appeared to have been obliterated, by drawing a pen through it,

and under it was written, in the handwriting of Moore, these words: "he would not have it on his note." A witness, by the name of Sellard, was introduced who proved that some time in 1823 (but the particular time he could not name), he thinks on a court day, he heard Moore apply to Graves for a loan of a sum of money, perhaps \$10 or \$15; that Graves immediately drew from his pocket a roll of money and gave Moore, he thinks, two bills, the amount of which he knew not, nor could he say what sort of bank paper, not having inspected the notes; and that after having received the bills Moore asked Graves whether he was willing to have the amount of the bills credited on his note, to which Graves replied he had no objection, and thereupon the parties separated.

After the evidence was all gone through, a motion was made by the counsel of Moore & Burton to exclude from the jury the testimony of the witness Sellard, but the motion was opposed by the counsel of Graves, and in turn he moved the court to instruct the jury, that as the credit for twenty dollars appeared to have been once upon the note, though afterwards erased, it devolved upon Moore, the holder of the note, to prove that the erasure was rightfully made. The court refused the instruction which was asked by Graves, and excluded the testimony of the witness, on the motion of Moore & Burton.

The decision is not approved on either point. The objection to the excluded testimony seems to have been taken on the ground of its irrelevancy to the point in contest, and if it were so, we should have no hesitation in sustaining the decision which went to exclude it. But it requires no effort of the mind to discover that the testimony was well calculated to prove that the credit, which had been entered upon the note, was placed there, not only in conformity to payment actually received by Moore, but by the approbation of Graves; and if so, none will doubt the materiality of the testimony to illustrate the contested fact of payment. It is no objection to the testimony, that the same facts which it went to establish might have been inferred from the indorsed credit upon the note, for that credit had afterwards been erased by Moore, under the pretext of its having been applied without the assent and against the will of Graves; and the testimony, while it went to fortify the inference deducible from the indorsement itself, also goes to repel the pretext assigned by Moore for erasing the credit. The testimony was not, therefore, irrelevant, and should not have been excluded from the jury. But were it even admitted that the tes-

timony was properly excluded, still we should be of opinion that the instruction which was asked by Graves should have been given to the jury. The credit which was indorsed upon the note by Moore, is undoubtedly equivalent to an admission by him that so much as was credited had been paid, and there is no principle of evidence which will allow a person, after he has admitted a fact, even if the admission be by parol, and not in writing, to do away the force of the admission by an after denial or withdrawal of it. Though it be afterwards denied, if it were by parol only, or if it be in writing, though it be afterwards erased or obliterated, the admission is, nevertheless, evidence against the person making it, and is entitled to all the weight of evidence of that sort, until explained away or disproved by him.

The result is, that the judgment must be reversed, with cost, the cause remanded to the court below, and further proceedings there had, not inconsistent with this opinion.

ALDRIDGE v. BIRNEY.

[7 T. B. MONROE, 344.]

EQUITY—SET-OFF.—Where one obligation forms the consideration of another, and one of the parties, without performing his obligation, removes from the state, having assigned the obligation to him of the other party, the latter may be relieved in equity against a judgment recovered by the assignee.

PARTIES IN EQUITY.—In the case mentioned it is not necessary to make the original obligee, against whom the complainant sets up the obligation he relies on as a set-off, a party.

DATE AND SUBSCRIBING WITNESSES of two agreements being the same, the presumption is, until evidence is adduced to the contrary, that one forms the consideration of the other.

ERROR to the Garrard circuit. Bill in chancery. The opinion states the case.

Anderson, for plaintiff.

Marshall, contra.

By Court, **MILLS, J.** On the seventeenth of February, 1800, John Aldridge executed to Miller Wood the following instrument of writing:

“I promise to pay Miller Wood eleven pounds one shilling and six pence, in either merchandise or whisky, at three shillings nine pence per gallon, on or before the first day of July

next, for value received. Witness my hand and seal the seven
teenth February, 1800. (Signed) JOHN ALDRIDGE. [SEAL.]”

This writing Wood assigned to a certain Willick, who assigned it to Elisha Freeman, who assigned it to James Aldridge, who assigned it to Stephen Pirkins, who assigned it to James Birney, who brought his action at law thereon, and recovered judgment against the obligor. To be relieved against this judgment, John Aldridge filed his bill in equity, showing that on the same day of the execution of his bond to Wood, Wood executed his obligation to him (Aldridge) to the following effect:

“ Under the penalty of one hundred pounds, I oblige myself, my heirs, etc., to do, or cause to be done, the following work, to the house in Lancaster, on lot No. 10, to wit: hew and put up one other set of logs, and to be of white oak, and finish the roof in a good and workmanlike manner. The logs above to be hewed three sides. Also to furnish five hundred and fifty feet of good sound flooring plank, and do fifty dollars’ worth of mason-work on said house; should the said mason-work that is necessary for the said house not amount to fifty dollars, said Wood is to pay the balance in cattle; and if more, said Aldridge is to pay in cattle; said carpenter’s work shall be done by the last of March. Witness my hand and seal, this seventeenth of February, 1800. (Signed) MILLER WOOD.”

He charges this writing was given in consideration of the first, or that one constituted the consideration of the other, so far as the first extends; and that Wood violated his covenant in every particular, and performed no part, and even sold part of the materials belonging to Aldridge at the building before his departure from the state, and that he had departed and left no remedy to Aldridge to recover for his breaches and failures; the amount of which he claims as a discount against the note held by Birney. Birney answered, declaring his ignorance of the equity set up and requiring proof. Wood never answered, but order of publication was made against him. The court below dismissed the bill of Aldridge, with costs and damages.

It appears in proof that Aldridge had bought lot number 10 of Wood, and Wood had stipulated to do the work contained in his bond to Aldridge, on the lot; and that he had wholly failed to do it before he departed from the country. It is evident, from the date of the two writings, that one did form part of the consideration of the other; that is, that the writing

given by Aldridge did form part of the consideration of that given by Wood to Aldridge.

Under these circumstances we do not doubt the failure of Wood to perform his covenant did give to Aldridge an equity which would follow his own obligation into the hands of Birney. It is true that the claims of Aldridge, or his obligation upon Wood for the breaches thereof, are of a legal character, and such as form a cause of action peculiarly proper for a court of law; but Wood, by leaving the country, put any legal remedy out of the power of Aldridge; and as one instrument formed the consideration of the other, it was competent for the chancellor to ascertain by a jury the quantum of damages, or the value of the defalcation of Wood: *Baylor v. Morrison*, 2 Bibb, 103.

But a difficulty here occurs with regard to parties to the contest. Wood is named as a defendant in the bill, and an order of publication was made against him, and there is a formal certificate by the printer that the order was inserted for two months; but it is evident from said certificate that part of those weekly insertions was after the day of appearance named in the order. The publication was commenced too late to have two months left before the appearance day, and the editor continued the publication afterwards to complete the requisite length of time. Of course, Wood could not be treated as a party before the court at the hearing. The question then arises, was he a necessary party? If he was, then no decree on the merits ought to have been rendered. The chancellor ought to have dismissed the bill for the want of proper parties, without prejudice, or to have directed the proper parties to be made in a reasonable time, and to direct the bill to be dismissed, because the new party or parties were not made, or brought in, at the end of that period. On the contrary, if Wood was not a necessary party, then the chancellor might have decreed upon the merits, as he has done, without him.

Wood was the assignor of the note or obligation held by Birney, and as that assignment passed the legal title of the note, it was not necessary that Wood should be a party, for the mere purpose of contesting that note, according to previous decisions. The same principle, we conceive, dispenses with Wood as a necessary party, notwithstanding there is still another obligation upon him, held by Aldridge, to be settled in this action. If the note held by Aldridge was for a liquidated demand, and could have been pleaded as a set-off at law, Aldridge could have made

that plea in the common law action; and allowing him to set up and liquidate the amount, and claim it as a discount against Birney in chancery, without making Wood a party, is permitting him to do no more than he could be allowed to do at common law. Wood, therefore, is not a necessary party; and although there was an attempt to publish him, yet, as that publication was not properly made, we can not suppose the complainant, Aldridge, in a worse situation, with his defective publication, than he would have been had he never named Wood as a party in his bill. It was proper, therefore, that the chancellor should decree upon the merits, disregarding Wood, as no party.

We can not doubt that one of these notes is the consideration of the other. They were of the same date, and witnessed by the same witness, and unless something on their face forbids the conclusion, or some other proof is adduced to the contrary, the presumption is that one forms the consideration of the other.

The court below ought, therefore, to have given to Aldridge the relief desired. A jury ought to be impaneled to ascertain the real injury or damages sustained by Aldridge, and on account of the failure of Wood to comply with this contract, these damages ought to be set off and discounted against the judgment held by Birney, even to the full amount, if they shall be so much when ascertained. If there be more, as Wood is no party, no decree for the overplus can be rendered.

The decree must be reversed, with costs, and the cause be remanded for such proceedings to be had and decree to be rendered, as shall conform to this opinion and the rules of equity.

A petition for a rehearing was submitted by the counsel for the defendant in error, and was overruled by the court.

SET-OFF IN EQUITY.—See, for an elucidation of this subject: *Lockwood v. Bates*, 12 Am. Dec. 136.

HART v. HAMPTON.

[7 T. B. MONROE, 381.]

EXECUTION SALES—DEFECTS IN PROPERTY SOLD, WHO LIABLE FOR.—The defendant in execution is not bound to disclose defects in the property exposed to sale by the sheriff, and a failure to disclose the same will not render him liable to an action of deceit.

ERROR to the Clarke circuit. Case. The facts are stated in the court's opinion.

Hanson, for plaintiff.

Simpson, *contra*.

By Court, BIRK, C. J. The declaration alleges, that the sheriff having an execution against the defendants, George and Jesse Hampton, was directed by the defendants to levy on sundry slaves, which the sheriff did accordingly; that at the sheriff's sale, the plaintiff, Hart, bid for and purchased one of the slaves for a sound price; that the plaintiff bid, under the belief that the slave was sound, and became the best bidder, and gave his bond to the sheriff for the price of two hundred and twenty-five dollars, as required by law; that the slave was unsound and diseased of the asthma, which rendered him of no value; that the defendants were present at the sheriff's sale, knew of the unsoundness, and did not disclose it, but concealed it.

The defendants demurred. The court sustained the demurrer.

We perceive no principle of law by which the defendants can be charged in an action of deceit, for being silent at a sheriff's sale of their property. They are not the vendors, but the sheriff; he proceeds by the precept of the law, he was acting upon the defendants, as the law supposes, against their will, and in obedience to his duty imposed by law. The law authorizes him to seize and sell the property of the defendant in the execution, such as it is. The declaration alleges nothing against the defendants at the sale, but that they were silently and passively obedient to the process of the law.

Judgment affirmed, with costs.

McGUIRE v. KOUNS.

[7 T. B. MONROE, 386.]

EVIDENCE—SHERIFF'S SALES.—It is sufficient, in proving title under a sheriff's sale, that a copy of the judgment and so much of the record as shows that the court had jurisdiction of the defendant, be produced.

SHERIFF'S DEED—RECITALS IN.—A reference to the execution and a recital of its principal parts in a sheriff's deed, is a sufficient compliance with an act of the assembly, which directs the sheriff to recite in his deed, the execution under which he acted in making the sale.

IDEM.—In the recital of an execution in a sheriff's deed, an omission of the names of two of the defendants is immaterial, it being recited that the interest of all the defendants, described as the heirs of R. J., was sold and conveyed.

APPEAL from the Greenup circuit. **Ejectment.** The facts appear from the opinion.

Triplett, for appellant.

Brown and Depew, contra.

By Court, MILLS, J. This is a judgment in ejectment, obtained for certain lots in the town of Greenupsburg, and the title given in evidence by the lessor of the plaintiff was obtained by him under a purchase from the sheriff under execution. During the trial various exceptions were taken to the title of the plaintiff, the most important of which will be noticed in revising the judgment.

The judgment on which the execution issued was in the Scott circuit court, and the lessor of the plaintiff did not offer in evidence a complete copy of the record, but only the entry of the writ of inquiry of damages and judgment thereon, after entering the names of the parties and their appearance. This was objected to, because all the record was not produced, but the objection was overruled by the court.

It is a general rule that records, when used in evidence, must be produced entire. But this rule is laid down with some exceptions and limitations. The reason assigned for it is that the part of the record which is lacking may give the rest a different meaning. Where a record is used as evidence to prove the facts therein contained, the rule well applies. But where it is only used as it is here, to show the fact that there was such judgment, then so much of the record as is relevant is frequently permitted to be used. Here the fact to be shown was that there was such judgment to warrant the execution, and enough of the record is produced to establish that fact. It would be highly inconvenient to compel parties who hold titles under sheriffs' sales to produce, from distant counties, complete records in suits in chancery or at law as part of their title. Enough of the record, in such case, to show a valid judgment, by the service of process or appearance of the parties, is sufficient, and this copy produced shows that the parties appeared.

It is also excepted to the sheriff's deed that it does not recite the execution under which the sale was made, but only refers to it by description.

We suppose it must have been intended to complain, because the deed did not recite the execution in *hæc verba*. We do not conceive that the act of assembly, which directs the sheriff to recite in his deed the execution under which he acted in the sale, intended to require the execution to be repeated word for word. A reference to and description of the execution reciting

the material parts, such as its date, return, sum, parties, or the like, has been deemed sufficient, and deeds of that character have passed the ordeal of this court in silence, without ever supposing them defective because they did not repeat every word of the execution.

It was also objected that the deed omits the names of two persons named in the execution, and that therefore their title could not have passed by the sale, and the court refused so to instruct the jury. On examining the deed it does appear that in reciting the execution the names of these persons are omitted. But this omission, we conceive, is not sufficient to make the deed inoperative as to their interest, because the deed shows that the sheriff sold all the title of the defendants in the execution, and the sheriff conveys the whole interest of all the defendants by the description of the heirs of Robert Johnson, and the omission to recite all the names in the execution can not vitiate the operation of the deed upon the title which the sheriff declares in his deed he has sold.

Judgment affirmed, with costs.

In the note to *Dufour v. Camfranc*, 13 Am. Dec. 365, the question when the record must be produced to support a sheriff's sale is discussed at length.

TRIMBLE v. SPILLER.

[7 T. B. MONROE, 364.]

ASSAULT AND BATTERY—MEASURE OF DAMAGES.—In an action of damages, by a parent, for an assault and battery upon his daughter, the jury, in estimating the amount of damages, may take in consideration the feeling of the parties and character of the family.

ERROR to the Clark circuit. The opinion states the case.

J. Speed Smith, for plaintiff.

Crillenden, contra.

By Court, **OWSLEY, J.** Spiller sued Trimble and wife, and declared against them for a trespass, assault and battery, committed by Mrs. Trimble upon the daughter of Spiller, by which he sustained great loss of service, etc.

At the trial in the circuit court, after the battery as charged in the declaration was proved, under circumstances highly aggravated and injurious to the feelings of Spiller, and derogatory to the character of his family, Trimble moved the court to

instruct the jury, that in their estimate of damages they could not regard the disgrace of Spiller or his family, which resulted from the battery. But his motion was overruled, and the jury were instructed that in estimating the damages they had a right to consider the injury to the feelings of the parents, and the character of the family, occasioned by the assault and battery proved. The question for the determination of this court is, Was the circuit court correct, both in refusing and giving the instructions?

In our researches upon the subject, we have met with no reported case in which such a question, in an action like the present, has ever undergone a direct adjudication. But cases are to be found in which questions, turning upon analogous principles, have been decided, and which are understood to sustain the decision of the circuit court. The legal foundation of the action is the same, whether it be brought by a parent for the seduction or battery of his daughter. If there be a loss to the parent of the service of his child, he has an unquestionable right to maintain the action in either case, and in neither case is he allowed to recover without proof of the loss of service, or what, by construction of law, is equivalent thereto. The loss of service is not, however, admitted to prove the sole and exclusive consideration for the jury, in estimating damages, in either case. There is no principle that can limit the jury, in their estimate of damages, to the amount of damages from loss of service, occasioned by a battery on the child, that would not equally apply to the estimate of damages occasioned by the seduction of the daughter; and the rule is well settled, that in an action by a parent for the seduction of his child, the jury are not confined in their estimate of damages to the mere amount of the damage from loss of service, and the expense consequent upon the seduction, but may award compensation for the dishonor and disgrace cast upon the plaintiff and his family by such an injury: 3 Stark. Ev. 1308. Hence we infer that there is no error either in refusing or giving the instructions to the jury.

The judgment is consequently affirmed, with cost and damages.

BROWN v. WRIGHT.

[7 T. B. MONROE, 396.]

SURETY—HOW RELEASED.—A surety of a purchaser can not obtain relief against his obligation on the ground of fraud in the sale, unless it appear that his principal and the vendor have combined to defraud him.

IDEM.—A NOVATION between the principal and creditor, whereby time is given, to the prejudice of the surety, discharges him; but the new contract should be made clearly to appear, and that it was so prejudicial to the surety in its tendency, that the obligee ought to be compelled to rely upon it, and not be allowed to resort again to the surety.

ERROR to the Logan circuit. Bill in chancery. The opinion states the case.

Mayer and Crittenden, for plaintiffs.

Pope and Monroe, for defendant.

By Court, **MILLS, J.** Lilburn Wright filed his bill to be relieved against three judgments at law, founded on three notes executed by him as surety for Robert A. Wright, Jesse T. Wright being another co-surety, to George Brown. One of these notes was assigned by Brown to H. Slater, and the other two retained by Brown, and on all separate judgments were obtained against Lilburn Wright only. His equity, on which he relies for relief, may be summed up under the following heads, to wit:

That George Brown was one of several proprietors of the town of Cumberland, in Tennessee, as laid off, and the lots in which were sold out by said proprietors, and in the division of the notes of the purchasers among the proprietors, these in question fell to Brown, and each was given for the purchase of lots in said town, made by Robert A. Wright at the public sale of lots; and it was represented at the said sale by the proprietors:

1. That shortly after the sale the proprietors would build a bridge across Red river, which would greatly increase the value of lots in the town, and also that they would build convenient and commodious warehouses in the town, which deluded the bidders, and lots were sold for hundreds of dollars that were not worth as many cents;

2. That the proprietors had many secret by-bidders for the lots, and the auctioneer himself would cry bid after bid when it was unknown whence the bid came; and in fact the bids were made by the auctioneer himself by secret instructions from the proprietors;

3. That, as the complainant is advised, George Brown and the remaining proprietors of the town had not, at the time of the sale, a good and sufficient title to the land on which the said town was established;

4. That said proprietors failed to give any writing evidencing

the sale of lots at the time of sale, whereby the sale was void by the statute of frauds and perjuries.

He insists that the proprietors failed in performing those things, such as the bridge and warehouses, which they held out as inducements to the purchasing of lots; that the town is abandoned, and is a common.

He makes the principal, Robert A. Wright, and his co-surety, as well as Brown and Slater, defendants to this bill, and advertised against his principal as a non-resident, and took the bill as confessed.

Brown and Slater both answered the bill, denying the equity, and contesting the complainant's right to relief. The court perpetuated the injunction, and gave complete relief against the whole demand.

If we waive the objection against this decree of a perpetual injunction, without setting aside the contract *in toto*, we can not perceive on what principle the court below could have given relief to the surety, on the equity set up, without that relief being asked by the principal. The principal, it is true, is made a defendant; but it is not even suggested in the bill that he resists the fulfillment of the contract, or desires relief from it. The grounds relied on are fraud, delusion, and failure of consideration, for the purpose of setting aside the contract. It must rest on the election of the principal, whether he will or will not avail himself of these grounds, if they exist. He still has a right to waive this equity and insist on a fulfillment, and his surety has not a right to make that election for him. Indeed, so far as the bill in this case shows, it is not even the surety forcing the principal into the measure of setting aside the contract, but it is an attempt on the part of the surety to relieve himself by the equity of a supposed fraud on his principal, leaving his principal hereafter to act as he chooses; and not only the principal hereafter, but the co-surety has a right each to their bill for relief, or a right to waive the equity. It is, in general, true that a surety, where the defense rests in an equity against the contract, follows the fate of the principal, and is bound when the principal is bound, and released when the principal is released; and there are cases where, if the contract be voidable only in equity, and that at the election of the principal, the surety can not make that election for him; and such we conceive this case to be. Whether, in such cases, if the principal should refuse to make the defense by way of a fraud on his surety, and combination with the opposite party, there

might not still be relief granted to the surety, we need not now determine. For, if there be such, the fraud and collusion, or combination, ought to be charged in the bill, and made out in evidence, and here there is no attempt to do so. We, therefore, conceive, that under the circumstances of this case, the complainant can not avail himself of the equity which he has set up.

But there is another ground or other grounds of equity set up in the bill against both Slater and Brown, which are proper for a surety to avail himself of, and which could be of no avail to the principal. That is the following: That Brown made a new agreement with the principal, without consent of the surety, whereby day was given to the principal, to the prejudice of the surety. It is likewise alleged, that Slater had made a like agreement with Robert A. Wright, the principal, to the prejudice of the surety.

That such agreements may operate in equity to discharge the surety, has been often held by this court, as well as other courts of equity; but it is essential to such a discharge, that the contract with the principal should be made clearly to appear, and that it was so prejudicial to the surety in its tendency, that the obligee ought to be compelled to rely upon it, and not to be allowed to resort again to the surety. But in this case, the agreements on the part of both Brown and Slater, with the principal, Robert A. Wright, were conditional only, dependent on the compliance of Robert A. Wright, and had he complied, the said agreements would have operated to the benefit of the surety. He did not comply, and there is no proof conducing to show that by said agreements any lapse of time took place prejudicial to the surety. Indeed, the case on this ground of equity is very deficient in point of proof of the facts charged, so much so, that it can not be perceived clearly what the agreements were, and how they operated to the prejudice of the surety.

The decree must be reversed with costs, and the cause be remanded, with directions to dissolve the injunction, and dismiss the bill with costs and damages.

See note to *Cope v. Smith*, 11 Am. Dec. 589, as to when surety is released by extension of time to the principal; and *Pain v. Packard*, 7 Id. 370, as to when he is discharged by failure to pursue principal

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DIVINE *v.* HARVIE.

[7 T. B. MONROE, 429.]

A STATE can not be sued in her own courts, unless there is an enactment of the legislature, providing the manner and in what courts she may be sued.

A STATE can not be made a garnishee, nor can the auditor and treasurer be made parties to a suit, in place of the state, to obtain a warrant and money from the treasurer.

CREDITOR OF THE STATE can not be compelled, by bill, under the act subjecting choses in action of a debtor to the satisfaction of his creditor's judgment, to assign his warrants on the treasury, or otherwise transfer the demand to his creditor.

DEMAND ON THE STATE is not a chose in action within the statute mentioned.

STATUTES—STATE, WHEN AFFECTED BY.—A state is not embraced by an act made to operate between individuals, unless such intention is apparent in the act, and an act subjecting the debts due a judgment-debtor to his creditors, does not embrace a debt due by the state.

APPEAL from the Franklin circuit. Bill in chancery. The opinion states the case.

Denny, Haggin and Loughborough, for appellant.

Marshall and Criltenden, contra.

By Court, **MILLS, J.** The legislature of Kentucky, at their session of 1825, allowed to Roger Divine two hundred and fifty-two dollars and fifty cents, for cutting and piling wood for the house of representatives during that session, and this allowance was made in the ordinary appropriation bill.

John Harvie, who was creditor of said Divine, by judgment and an execution of *feri facias* thereon, returned "no property found," filed his bill in equity, to subject this claim of Divine against the state, to the satisfaction of his judgment, under the act of assembly which authorizes a bill in equity to subject equitable estates and choses in action to the satisfaction of such judgments. He made said Divine, the auditor and treasurer of the state parties, and prayed that the auditor might be directed by the decree of the court to draw the warrant in his favor, and the treasurer to pay it in satisfaction of so much of the judgment.

There being no dispute about the facts of the case, Divine submitted the case to the court on demurrer to the bill, for a final decree. The court below decreed in favor of the complainant, and directed the auditor to draw the warrant to Harvie, and the treasurer to pay him the amount.

From this decree Divine has appealed.

The act of assembly under which these proceedings were had, reads thus:

“ Whenever an execution of *feri facias*, founded upon any judgment or decree, or upon any bond having the force of a judgment, shall issue to the proper officer, and be returned, as to the whole or any part thereof, in substance, that the defendant hath no effects in his bailiwick to satisfy the same, the proper court or courts of chancery shall have jurisdiction, on bill filed, to subject to the satisfaction of such judgment, decree, or bond, any choses in action belonging to the debtor, and also any equitable or legal interest in any estate, real, personal, or mixed, which the debtor may be entitled to; and to that end may bring other parties before the court, and make such decree as may be equitable under the jurisdiction hereby conferred.”

The expressions of this statute are very broad, and it does subject to the power of the chancellor the interest of the defendant of almost every character. It is now our part to consider whether it is broad enough to reach this demand of Divine against the state, and subject it to his debts; or whether this appropriation by the state is excluded in this provision.

It seems to be conceded on all hands, that the state can not be made a party defendant, and is not suable in her own courts.

Although the constitution has declared that “ the general assembly shall direct by law in what manner and in what courts suits may be brought against the commonwealth,” yet that body has never complied with this direction, but has hitherto kept in their own power the granting of justice to creditors of the state on petition. This voluntary grant of the state to individuals, is the only judgment and execution to which the state is subject. Whatever, then, the claims of Divine may be against the state, and however clearly they may be acknowledged, the state can not become a garnishee, and we can not suppose that this act, granting jurisdiction to the chancellor, was intended to make the state suable.

Nor do we conceive that the auditor and treasurer are proper parties to the controversy, or that they can be used as a substitute for the state. They are not officers appointed to defend the interest of the state generally, although by special act of assembly they may be used as such. The attorney-general has more claims to the general appointment to defend the rights of the state.

The only analogous case in our recollection, which might be

supposed to give color to the right of making the auditor and treasurer parties, where the state could not be sued, is that of *Osborn v. United States Bank*, 9 Wheat. 738. But the analogy between the cases fails in an important particular. In that case, under an act of the general assembly of Ohio, the auditor issued his warrant to an officer of his own appointment, to seize and take by distress, from the Bank of the United States, or one of its branches, a sum of money assessed by an act of the legislature on the branch, as a tax due the state for exercising the corporate franchise within the state. The officer so appointed executed the warrant, took one hundred thousand dollars, and deposited it with the treasurer, who received it, and the bill brought by the bank with injunction, made the auditor, the officer of distress, and treasurer, parties, restraining further attempts to execute the act of the legislature, and praying a restoration in specie of the sum already taken. It was objected that the state was not suable; that it was a controversy between the bank and the state substantially; and, of course, that the suit would not lie. It was ruled by the court that if the state had been liable to suit, the bank would have had its election to sue the state or her agents, who had become liable by attempting to execute a void act, under which they could not justify; and, of course, as the state could not be sued, her exemption did not defeat the cause of action against the agents, that they, by executing a void act, were personally liable, and by reason of that personal liability, they were proper parties, and therefore the proceedings against them might be sustained without joining the state, just as the actual trespasser, who commits his trespass at the command of another, may be made responsible alone, without uniting the person who gave the command.

In this case there is a total want of personal liability on the part of the auditor or treasurer. There is no claim against them as individuals; and as officers, they are not appointed to defend for the state, and, of course, there is a total defeat of parties here as garnishees, or stakeholders of the fund, which the chancellor is called upon to subject.

As the state is not suable, and the auditor and treasurer are not proper parties in lieu of the state, it remains to inquire whether this bill can be sustained against Divine alone, and whether the chancellor ought, or ought not, to compel Divine to transfer this claim, or to give an authority to the auditor to draw, and the treasurer to pay over to the complainant. It

may be urged that the equity of such a course is strengthened, because Divine has a right to the fund, and the complainant can not make the person who owes it a party to subject it. This money due from the state was no part of the estate of Divine until he received it, because the claim attached to no specific money, and therefore not within those expressions of the act which subject estate, real, personal, or mixed.

Nor can it be strictly said to be a chose in action, which literally signifies a thing for which an action may be brought, and we have seen that no action would or could be brought for this sum in favor of Divine against the state.

But as Divine might have proceeded by mandamus against the auditor and treasurer to compel them to pay this money out of the treasury, in case of their refusal, it may be urged that the claim comes within the spirit of the term chose in action, and therefore is at least within the equity of the act.

This reasoning is entitled to weight, and might command our assent, was it not for another rule of law which operates to the exoneration of this claim. It is a rule that the commonwealth is not embraced by an act which is made to operate between individuals, unless there is something in the act which shows an intention to subject the state to the same rule.

The act unquestionably intended to subject the debtors of a debtor to the demands of the creditor of but one of them. But did the legislature intend to make the state such a debtor as that she would be compelled to pay her debts to the creditor of her creditor? We conceive not; and evil might result to the public weal, if contracts made with the state could by construction only be emptied and made fruitless at the instance of the creditors of her contractor.

The credit of the contractor with government may, and frequently does, depend upon the credit of the government; the belief that government is able, enables the contractor to obtain what the government needs; and if other creditors can change the destination of the fund, the contractor may sink, and the government suffer injury by the failure.

To make the matter more palpable we will apply the rule to the government of the United States, and suppose that creditors of her mail contractors, or contractors for the sustenance of the army, could compel such contractors, by the decree of a court of equity, to assign over and transfer the securities and vouchers of the government for the demands due and becoming due from the government. How often, in that event, might the

transportation of the mail fail by such an interference of creditors, or the sinews of war be cut and an army be left destitute ! Government, as a sovereign, may contract with whom she will, and the credit which she gives by her obligation may be, and frequently is, the only credit which her contractor possesses. If that credit can be directed to other debts, instead of the supplies of the government, against the will of her contractors, injury to government and disgrace to the officer may be the consequence. It would be a mortifying circumstance to see a member of the legislature rendered unable to pay his sustenance, while attending on its session, because a creditor who never dealt on the credit of the fund should, by injunction, detain his compensation, on which he obtained credit with his host. Many instances of public injury and of disgrace to officers might be produced, which would result from supposing that the debts due from the government to her officers and contractors were subjected, by the act, to the same rule with individual debts, which induces the belief that this class of debts, or choses in action, if such they can be called, were not intended, and that without express direction the courts of equity ought not to bring such contracts of the state to the same footing with other contracts and debts. It will be proper that the legislature should first expressly determine how far, with safety, the state's own contracts and engagements shall be thus involved in danger.

The decree, Judge Owsley dissenting, is reversed with costs, and cause remanded, with direction to dismiss the bill with costs.

OWSLEY, J. I have not been able to bring my mind to assent to the construction put upon the act of assembly, on which this case turns, by a majority of the court, or the conclusion to which that construction leads. I perceive no good reason for excepting out of the act debts due from the government, while debts owing by one person to another are admitted to be within it. The interest, which the person to whom debts of either sort are due, has in the money, according to my understanding, comes literally within the provisions of the act. To bring debts due from government, within the provisions of the act, it is not necessary to maintain that such debts are strictly and technically choses in action. The act has not only subjected to the satisfaction of the judgment of creditors all choses in action belonging to the debtor, but it has also expressly made subject to judgments all equitable and legal interest in any estate, real, personal, or mixed, to which the

debtor may be entitled; and, to my mind, it is perfectly clear that the interest which one, to whom government is indebted, has in the debt, is an interest to which he is entitled in personal estate. Money, as well as any other specific chattel, is personal estate, and the interest, to which a person is entitled in any debt owing him, must necessarily be an interest in the money due, and, of course, an interest in personal estate. If, by the rules and usages of equity, it were impracticable to reach debts due from government, there would certainly be great plausibility in excepting debts out of the act. But, while I admit government can not be sued, I discover no difficulty in reaching any debts which she may be owing to others. It can not be done by process against government, but it may be done by acting on the person of him to whom the debts are owing; and, although by legislative inaction, the decrees of courts of equity may now, in cases where such a course is proper, be enforced by writ of execution, in ancient times they were most generally enforced by acting on the person of the defendant; and there is nothing in the act of the legislature prescribing a different course, to prevent the court from enforcing its decree according to the former practice and usage.

Though a debt be owing by government, let the consideration of it be what it may, I discover no reason for protecting the person to whom it is owing in the enjoyment of it, and withholding it from the demands of his creditors, that does not equally apply to debts of any other sort. There is, in moral justice, the same obligation on a debtor, to apply demands which he may have upon government to the satisfaction of debts owing by him, as there is for the application of demands of any other sort to that purpose.

Nor do I perceive the danger to which government will be exposed by making the act embrace debts actually owing by her. After the debt is payable, it can not be important to the interest of government, whether the money is paid over to the person with whom it was contracted, or to any other. Though the payment be made to another, the wheels of government may move on as before, without the apprehension of danger to the post-office establishment, or fears that members of the legislature may be disturbed in their official deliberations. I view the act in the light of a remedial statute, and conceive that instead of a strict construction it should be expounded liberally in favor of creditors, for whose benefit it was enacted.

My opinion is, that the debt due from government to Divine

is within the provisions of the act, and that he should, by the appropriate decree, be compelled to furnish the necessary means to enable the complainant to recover the money.

UNITED STATES AND STATES NOT SUBJECT TO GARNISHMENT.—Officers of the United States, and of the different states, having money in their hands to which certain individuals are entitled, are not liable to the creditors of those individuals in the process of attachment, garnishment, and the like. This rule, as far as the same is applicable to national and state officers, has never been seriously questioned, having been established at an early date in the history of our government, and ever since sustained by the adjudications of both the national and state courts: Freeman on Executions, sec. 132; Drake on Attachments, sec. 512;—*Buchanan v. Alexander*, 4 How. (U. S.) 20; *Stillman v. Isham*, 11 Conn. 124; *McMeekin v. The State*, 4 Eng. (Ark.) 553; *Wild v. Ferguson*, 23 La. An. 752; *Tracy v. Hornbuckle*, 8 Bush, 336; *Rodman v. Musselman*, 12 Id. 354; S. C., 23 Am. R. 724; *Rolls v. Andes Ins. Co.*, 23 Gratt. 509; S. C., 14 Am. R. 147; *Bank of Tennessee v. Dibrell*, 3 Sneed (Tenn.) 378; *The Mechanics and Traders' Bank v. Hodge*, 3 Robinson (La.) 373; Opinions of the U. S. Attorney-General, vol. 3, p. 718; Id., vol. 5, p. 759; Id., vol. 10, p. 120; *State v. Curran*, 7 Eng. 322; *Danley v. State Bank*, 15 Ark. 16; *Spalding v. Imlay*, 1 Root, 551; *Wicks v. Branch Bank of Mobile*, 12 Ala. 594; *Dobbins v. Railroad Company*, 37 Geo. 240; *Wilson v. The Bank of Louisiana*, 55 Id. 98; *Garn. of Brashears v. Root*, 8 Md. 95; see, *Averill v. Tucker*, 2 Cranch, C. C. 514. The reasons for this rule will be briefly considered. The process of garnishment is substantially the prosecution of an action by the defendant in attachment, in the name of the plaintiff, against the garnishee, see *Daniels v. Clark*, 38 Iowa, 536; or, as more accurately stated by Daniel, J., in *Tunstall v. Worthington*, Hempstead, C. C. R. 662, "the proceeding must be regarded as a civil suit, and not a process of execution to enforce a judgment. * * * In this proceeding the parties have day in court; an issue of fact may be tried by a jury, evidence adduced, judgment rendered, costs adjudged and execution issued on the judgment;" and, as a state is not liable, by virtue of her sovereignty, to be sued in her own courts, except by an expressed authorization by the legislature, to subject her officers to trustee process, garnishment, and the like, would be to allow that to be accomplished indirectly that could not be attained in a direct suit, namely, the compelling a state to be a defendant in her own courts, without permission first having been obtained in the manner provided by law. In *Tracy v. Hornbuckle*, 8 Bush, 336, the supreme court of Kentucky in considering this important question said: "Such funds were due from the state to one of its employes, and, as the state can not be sued nor made a garnishee, parties will not be allowed to evade this inhibition by ignoring the state in their suits and proceeding directly against the public officer having the custody of the moneys sought to be reached." In *Rolls v. Andes Ins. Co.*, 23 Gratt. 511; S. C., 14 Am. R. 147, the supreme court of Virginia, in affirming the rule above stated, expressed itself in an able and masterly opinion as follows: "Garnishment also operates as an attachment or levy upon the effects of the defendant in the hands of the garnishee. It renders the garnishee liable for such effects or their value, if they are not forthcoming to meet the judgment of the court. And it has been held in several cases that the garnishee will be personally responsible if the goods are taken from him by a wrong-doer. * * *"

Now, it would seem to be very clear upon general principles that the treasurer of the state having the control and custody of insurance funds and securities under an act of the legislature can not be subject to any proceedings of this sort. * * * Something more is involved than the rights and obligations of the treasurer. It is a question that concerns the state. It is certainly not compatible with her sovereignty and dignity to be arraigned before her own tribunals, at the suit of individuals, in any other mode than is prescribed by her statutes."

Another reason, equally as important as the one last considered, and the foundation of the opinion of the supreme court of the United States in a leading case on this subject, is the fact that moneys sought to be garnished, as long as they remain in the hands of the disbursing officers of the government, belong to the latter, although the defendant in attachment may be entitled to a specific portion thereof; consequently it cannot, in a legal sense, be considered a portion of his effects, and, therefore, not liable to attachment or garnishment, under process issued for the purpose of levying upon and subjecting such individual's property to the satisfaction of a judgment recovered against him: *Buchanan v. Alexander*, 4 How. (U. S.) 720, is the leading case, above referred to. Mr. Justice McLean, speaking for the court in that case, said: "The important question is whether the money in the hands of the purser, though due to the seaman for wages, was attachable. A purser, it would seem, cannot, in this respect, be distinguished from any other disbursing agent of the government. If the creditors of these seamen may, by process of attachment, divert the public money from its legitimate and appropriate object, the same thing may be done as regards the pay of our officers and men of the army and of the navy; and, also, in every other case where the public funds may be placed in the hands of an agent for disbursement. To state such a principle is to refute it. No government can sanction it. At all times it would be found embarrassing, and under some circumstances it might be fatal to the public service. The funds of the government are specifically appropriated to certain national objects, and if such appropriations may be diverted and defeated by state process or otherwise, the functions of the government may be suspended. So long as money remains in the hands of a disbursing officer, it is as much the money of the United States as if it had not been drawn from the treasury. Until paid over by the agent of the government to the person entitled to it, the fund can not, in any legal sense, be considered a part of his effects." Also, in the *Bank of Tennessee v. Dibrell*, 3 Sneed (Tenn.), 383, Caruthers, J., said: "The relation of debtor and creditor, in the sense of the attachment and garnishee law, does not exist between the state and the employés. The funds set apart for that purpose belong to the state, and not to him who renders such service, until they pass out of the treasury and the hands of the disbursing officer. We held, at the last term of this court, that the pay of a pensioner could not be attached in the hands of a pension agent, nor in its transmission to him, by a private person, acting under a power of attorney from him; and this upon the ground that the fund did not lose the protection of this principle until it reached the hands of the pensioner." The last and most important reason why the government and its officers are not liable to attachment, garnishment and like process issued in actions pending between its citizens, is that of public policy. To embarrass the machinery of the National Government, or the governments of the different states, by interrupting the proper functions of their officers by such process, to compel its officers to answer and defend the litigation of private creditors, "would frequently place

it in the power of an individual to endanger the public interests, or even to check the wheels of government, which would be a far greater public evil than the occasional delay, or even sacrifice of a private right. The exemption is not given to the person for a private advantage, but granted to the officer from public necessity."

In the case of the *Bank of Tennessee v. Dibrell*, 3 Sneed (Tenn.), 378, an attempt was made to enjoin one Crozier, as comptroller, from issuing his warrant for the payment of the official salary of Dibrell as treasurer of Tennessee, and to apply the same in satisfaction of Dibrell's debts. A demurrer having been sustained to the bill, the supreme court of Tennessee, in affirming that decision, thus expressed itself: "This case, then, presents the naked question whether the salary of a public officer can be attached in the hands of the officers of the state who have control of the treasury, or any other officer intrusted by the laws with payment of demands against the treasury. Every consideration of policy would forbid it. No government can sanction it. It would be very embarrassing generally, and under some circumstances might prove fatal to the public service to allow the means of support of the servants of the government to be intercepted in the hands of the distributing agents. If the funds of the government, thus specifically appropriated for the support and maintenance of its agents, were allowed to be divested by process of attachment, in favor of creditors or otherwise, from their legitimate object, the functions of the government might be suspended. The state might be thus deprived of the services of her most valuable citizens. The same principle would allow the hard-earned pay of the officers in the army and navy, as well as that of the common soldier or seaman, or even the favored pensioner who happened to be poor and indebted, to be snatched from them in the hour of their greatest need. In this as well as many other cases, the most strong and meritorious private rights must be made to yield to the public interest. It is a prevailing principle in all governments that where private and public interest come in conflict, with proper exceptions, the latter [former] must yield."

In *McMeekin v. State*, 4 Eng. (Ark.) 553, an attempt was made to subject the state of Arkansas to a writ of garnishment. A judgment having been obtained against William Conway, one of the judges of the supreme court of that state, and the same remaining unpaid, a garnishment was served on E. N. Conway, auditor of public affairs, to compel the amount due William Conway, for his salary as supreme court judge, to be paid towards the satisfaction of the said judgment. Scott, J., speaking for the court, said: "Looking, then, to the whole record, the question is distinctly presented, whether or not the salary due from the state to one of her public officers, can, by garnishment, be seized before being paid to him, and appropriated to the payment of his judgment-debts. And this seems to be absolutely forbidden by considerations of public policy. In every enlightened community, public policy must ever be paramount to individual convenience and private interests. And it can not be doubted that the most efficient administration of the government in general, and the free course of the stream of justice in tribunals, are the very highest of these considerations. To interpret the will of the legislature as in conflict, in any degree, with these great public objects, could rarely, if ever, be done; as to do so would be abhorrent to every legal idea of civil liberty. And that the proper and efficient administration of the state government, in all its departments, would be endangered by the establishment of the doctrine contended for by the plaintiffs in error cannot, for a moment, be doubted, as it would, at all times, in its practical operation, be embarrass-

ing, would frequently be mischievous, and, under some circumstances, might prove fatal to the public service." So in the late case of *Rollo v. Andrus & Co.*, 23 Gratt. 509; S. C. 14 Am. Rep. 147, to which we had occasion to refer before, the consequences which might follow, provided the officer garnished should refuse to comply with the writ, were considered by Staples, J. He says: "If the garnishment operates in this case as in all others, to bind the effects, it is obvious that these securities may at any time be taken from the possession of the treasurer, to answer the demands of creditors. Judgment may be rendered against him for their value, if they are not forthcoming in obedience to the orders of the court; costs adjudged; and executions and attachments issued to enforce obedience or secure payment. These results must follow, or the court must contrive, in some way, to divest the judgment in these cases of the operation and effect attaching to all other proceeding by garnishment. The treasurer may conceive it to be his duty to refuse obedience to an order of the court requiring him to surrender the securities. How is this order to be enforced? Is he to be attached while in the discharge of his official duties, taken from his office, and detained in custody for refusing to violate a trust reposed in him by the legislature? He may decline to appear. Is the court to hear proof of the amount or value of these securities, and order their delivery to one of the officers of the court? * * * * *

Nor is it consistent with her [the state's] interests, nor the proper administration of public affairs, that her officers shall be arrested in their public duties and required to answer before the courts for funds or securities committed to their custody, for a specific purpose, under authority of a public law. The treasurer of the state is one of the most important officers of the commonwealth, with grave, arduous, and difficult duties to perform. It is impossible to foresee the mischiefs and embarrassments that will ensue, if, in addition to these duties, he is to be involved in the conflicts of creditors, to answer innumerable rival attachments, employ counsel, answer interrogatories, and otherwise consume time and attention which should be devoted exclusively to the public interests."

COUNTIES NOT LIABLE TO GARNISHMENT.—The same considerations that exempt officers of the national and state governments from the process of garnishment and the like, as far as the public funds intrusted to them are concerned, applies with equal force to counties and their officers. Counties are created for the purpose of government and the administration of justice. And as stated by Heydenfeldt, J., in *Hunsaker v. Borden*, 5 Cal. 290, "a county is not a person in any sense—it is not a corporation. It can not sue or be sued, except where specially permitted by statute; and such permission can be withdrawn or denied at any time the legislature may think proper. A county government is a portion of the state government, and the county debt created is a part of the public state debt, and in the same manner as there is no remedy against the state, there may be none against the county. The sovereign can not be sued in whatever form she may owe, whether through her own principal treasury, or one of her subordinate treasuries, unless by her own consent. Her creditors have nothing to rely upon except her good faith; and she has equally the power to postpone the time of payment, or to refuse to pay at all," and in conformity therewith the authorities are uniform that a county, or its officers, are exempt the same as a state and its officers from trustee process and the like: *Ward v. County of Hartford*, 12 Conn. 404; *Cheuly v. Brewer*, 7 Mass. 259; *McDougal v. Board of Supervisors of Hennepin County*, 4 Minn. 184; *Gilman v. Contra Costa County*, 8 Cal. 52; *Garnishees of Brashears v. Root*, 8 Md. 95; *Bulkeley v. Eckert*, 3 Pa.

St. 368; *Wallace v. Lawyer*, 54 Ind. 501; S. C. 23 Am. Rep. 661; *Williams v. Boardman*, 9 Allen, 570; Freeman on Executions, sec. 133; Drake on Attachments, sec. 516; Hermann on Executions, sec. 336; *Emeric v. Gilman*, 10 Cal. 404; *Boone County v. Keck*, 31 Ark. 387; *Randolph v. Ralls*, 18 Ill. 29; see *Adams v. Tyler*, 121 Mass. 380, where it was held that a county was chargeable in trustee process. In *McDougal v. Board of Supervisors of Hennepin County*, 4 Minn. 189, the reasons hereinbefore considered at length are reiterated, and it is determined that counties stand upon the same footing as a state, and that they are entitled to the same exemption. Flandrau, J., in delivering the opinion in that case, says: "Counties are public corporations, and their officers are public officers. The varied relations which such bodies, through their officers, hold towards individuals as their debtors, would render them liable to be constantly attacked with such process, and would very materially embarrass them in the performance of their duties. If they are subject to such suits, they are bound to give them the same attention which is required of private individuals, and this would involve their attendance upon distant courts, and the consequent absence from their respective offices. It would also very much embarrass them in their accounts, as each indebtedness disclosed would necessarily suspend the payment of the sum until the decision of the litigation between the principal parties, which might be protracted for years. Public policy can not tolerate such an obstacle to the exercise of official duties, as this rule would necessarily be, should it be allowed to obtain."

CITIES AND OTHER MUNICIPAL CORPORATIONS, WHETHER LIABLE TO GARNISHMENT.—Much difference of opinion has arisen on this branch of the question now under consideration. While on the one hand, as hereinbefore stated, the adjudications as to the garnishment of national, state, and county officers are uniform and harmonious; on the other hand, the decisions as to the liability of officers of cities and other municipal corporations to such process are irreconcilably opposed to and conflicting with each other. Arguments, able and forcible, are to be found on both sides of the question. The argument in favor of holding such corporate bodies liable to such process, is founded upon the policy of the law which requires all property and effects of the debtor to be subject to the payment of his debts. Notwithstanding the able arguments that have been advanced to support this view of the question, the better reasons, together with the preponderance of modern authorities, are found on the other side of the question. Mr. Dillon, in his valuable work on Municipal Corporations, sections 64 and 65, states the reasons generally advanced why such bodies should not be liable to such process, with a great deal of force, and, as we shall attempt to show, in harmony with the best considered modern authorities, as follows: "Municipal corporations are instituted by the supreme authority of a state for the public good. They exercise, by delegation from the legislature, a portion of the sovereignty. The main object of their creation is to act as administrative agencies for the state, and to provide for the police and local government of designated civil divisions of the territory. To this end they are invested with governmental powers, and charged with civil, political, and municipal duties. To enable them beneficially to exercise these powers and discharge these duties, they are clothed with the authority to raise revenues by taxation, and in other modes, as by fines and penalties. The revenue of the public corporation is the essential means by which it is enabled to perform its appointed work. Deprived of its regular and adequate supply of revenue, such a corporation is practically destroyed, and the very ends of its erection thwarted. Based upon consid-

erations of this character, it is the settled doctrine of the law that the taxes and public revenues of such corporations can not be seized under execution against them. Such taxes and revenue can not be seized either in the treasury or when in transit to it. Judgments rendered for taxes, and the proceeds of such judgments in the hands of officers of the law, are not subject to execution, unless so declared by statute. The doctrine of the inviolability of the public revenues by the creditor is maintained, although the corporation is in debt, and has no means of payment but the taxes which it is authorized to collect. Upon similar considerations of public policy and convenience, municipal corporations and their officers have usually, though not uniformly, been considered not to be subject to garnishment, although private corporations, equally with natural persons, are liable to this process." In Alabama this question came up for consideration in *Mayor v. Rowland*, 26 Ala. 498. Section 2516 of the Alabama Code provided that an attachment may be executed by summoning "any person indebted, or having in his possession or under his control, property belonging to the defendant." It was held, that notwithstanding section one of that code provided that the word "person" when used therein should include "corporation," the word "person" as used in section 2516 did not include a public municipal corporation. See, however, *Smoot v. Hart*, 33 Ala. 69, which would seem to be opposed to the rule established in *Mayor v. Rowland*. The latter case was affirmed in *Clark v. Mobile School Commissioners*, 36 Ala. 621, and the rule as therein stated may now be considered the settled law of that state.

In Connecticut, notwithstanding the decisions of the supreme court of that state, in *Stillman v. Isham*, 11 Conn. 124, and *Ward v. County of Hartford*, 12 Conn. 409, heretofore cited in *Bray v. Wallingford*, 20 Conn. 416, it was held that the process of garnishment might be issued under a statute which provided that "debts due from any person to a debtor" might be attached, and that the word "person" in such statute included towns and other municipal corporations.* This decision was placed by the court principally upon the ground that, inasmuch as such corporations were liable by statute to be sued, consequently they were liable to be subject to such process; and for this reason it was held not to be within the rule established in *Ward v. County of Hartford*. The court also in the course of its decision made use of the argument generally found in decisions favoring this view of the question. It said: "The general principles of justice and equity, which require that that particular species of property owned by a person which consists of debts due to him should equally with his other property be rendered available to his creditors, and which induced the legislature to make them so, obviously apply as fully to debts due to him from municipal or territorial as from other corporations, or from natural persons."

In Georgia, on the ground of public policy, municipal corporations are not liable to be garnished: *Holt v. Experience*, 26 Ga. 113; *McLellan v. Young*, 54 Ga. 399; S. C., 21 Am. Rep. 276.

In Illinois the decisions are uniform, and there it has been invariably held that public policy required that the protection of exemption from the service of garnishments should be extended to municipalities: *City of Chicago v. Haske*, 25 Ill. 595; *Merwin v. City of Chicago*, 45 Id. 133. The latter case is an able presentation of this question, and is cited at length in the fifth edition of *Drake on Attachments*, sec. 516, note.

The Code of Iowa, approved February 5, 1851, sec. 1861, provided that "the attachment by garnishment is effected by informing the supposed debtor or person holding the property that he is attached as garnishee." Under this section

the city of Muscatine was held liable to the process of garnishment, the word "person" being held to include public corporations: 4 Iowa, 302. In section 3196 of the "Revision of 1860" it was provided by the legislature of Iowa that "a municipal or political corporation shall not be garnished." See Code of Civil Procedure of Iowa, sec. 2976, compiled by J. S. Stacy. Notwithstanding these enactments by the legislature, it was held in *Clapp v. Walker*, 25 Iowa, 315, that a municipal corporation might waive its statutory privilege of exemption from garnishment, and that if, instead of pleading its exemption, it appeared and filed its answer admitting the indebtedness, its exemption was thereby waived.

In Kentucky, in the late case of *Rodman v. Musselman*, 12 Bush, 354; 8 C., 23 Am. Rep. 724, decided in 1876, the rule as to the exemption of a state and her officers as stated in the principal case of *Divine v. Harvie*, 7 T. B. Mon. 439, was held not to apply to towns and cities, and the same were held liable to be "attached and subjected to the payment of their debts by the coercive power of the law."

In Louisiana, Maryland and Massachusetts, municipal corporations are held exempt from garnishment and like process: *Egerton v. The Third Municipality*, 1 La. An. 435; *Mayor v. Root*, 8 Md. 95; *Hadley v. Peabody*, 13 Gray, 200. But see *Adams v. Tyler*, 121 Mass. 380. Space forbids the insertion at length of the case of *Egerton v. The Third Municipality*, but the reasons there advanced seem to us to be unanswerable.

In 1847 the supreme court of Missouri, in *Hawthorn v. St. Louis*, 11 Mo. 59, held that a public corporation was not liable to be garnished, although in *St. Louis Ins. Co. v. Cohen*, 9 Mo. 427, it was held that private corporations were so liable. In *Fortune v. St. Louis*, 23 Mo. 239, *Hawthorn v. St. Louis* was affirmed. The case of *Pendleton v. Perkins*, 49 Id. 565, is a peculiar one. The plaintiff filed a bill in equity to compel the city of St. Louis to pay a debt due him from the defendant, Perkins, alleging that the latter had absconded, so that no judgment could be obtained against him; that he was insolvent, and had no property except certain money in the city treasury. The bill was demurred to, and the demurrer sustained. The supreme court, in considering the question as to when a municipal corporation was liable to be garnished in equity, said: "Our garnishment act (sec. 3) exempts municipal corporations from its operation, and it is claimed that, upon the principle that equity follows the law, they should also be exempt from creditors' bills or garnishments in equity. Municipal corporations in this regard are classed with sheriffs, tax collectors, administrators, etc., who hold as trustees and would be exempt without the statute. So it had been held before this enactment, that towns and cities could not be garnished for a sum due an officer as part of his salary: *Fortune v. St. Louis*, 23 Mo. 239; *Hawthorn v. St. Louis*, 11 Id. 59. Public policy forbids creditors from thus stepping in between the city and its public servants; and the statute, in seeking to prevent any future attempt in that direction, went much further, and included all kinds of liabilities, so that a debtor's funds, if in the hands of a municipal corporation, are placed beyond the reach of his creditors by statutory garnishment. There is no reason why a city, for an ordinary liability unconnected with its present public service, or the prosecution of its public works, should not, like private corporations, be held to answer a garnishment process. But the prohibition is general, and creditors like the present plaintiff are deprived of the usual remedy against their absconding debtors, if the latter have been sharp enough to place their funds in the city treasury. Upon what principle should this fact also deprive them of the equitable remedy they would possess if the garnishment process was unknown to the

law? The maxim that equity follows the law has no such application; otherwise, in most cases where legal remedies fail, equitable relief would be cut off. The court, in analogy to the former relief in chancery, would disregard the letter of the statute forbidding garnishment, but would conform to its spirit and refuse to interfere when the reason for the prohibition existed. Perhaps the object of the prohibition was to leave the matter to another forum, to one whose remedies are more flexible than ordinary judgments, so that whatever the relief, it may be consistent with public policy, and may be given in view of the debtor's relation to the city. To deny the relief would permit the debtor to withdraw the property from the state which equitably belongs to his creditors. It is the policy of the law to protect home creditors, and in pursuance of this policy and in absence of any other remedy, I think these proceedings should be sustained."

In New Hampshire, in 1829, it was held that a town was subject to a foreign garnishment: *Whidden v. Drake*, 5 N. H. 13. Subsequent decisions seem to have adopted a different rule in that state: *Wendell v. Pierce*, 13 N. H. 502; *Brown v. Heath*, 45 Id. 168; See *Morse v. Towns*, Id. 185.

In Ohio, in an action brought against one Brooke and the city of Newark to subject certain indebtedness owed by the city to Brooke, it was held that the same might be maintained: *City of Newark v. Funk*, 15 Ohio St. 462. This decision seems to have been placed, however, upon the peculiar provision of section 458 of the Ohio code, which provided that an action might be brought to subject to the payment of a judgment, all "money, goods, or effects," which the judgment-debtor might have in the hands of "any person, body politic or corporate."

In Pennsylvania, municipal corporations are exempt, from motives of public policy: *Erie v. Knapp*, 29 Pa. St. 173; *Greer v. Rowley*, 1 Pittsburgh, 1.

In Rhode Island, by the revised statutes of that state, all corporations are liable to be sued and to be garnished: Rev. Stat. c. 125, sec. 1, c. 183, sec. 6, and Statutes, chap. 858, sec. 2. Under these statutes municipal corporations are held liable to answer to the process of garnishment: *Wilson v. Lewis*, 10 R. I. 285, decided in 1872.

In Tennessee municipal corporations have been held exempt from trustee process and the like: *Moore v. Mayor*, 8 Heisk. 850; *Memphis v. Laski*, 9 Id. 511; S. C., 24 Am. Rep. 327; *Parsons v. McGavock*, 2 Tenn. Ch. 581. In *Memphis v. Laski*, the word "person" in a statute authorizing the process of garnishment, was held to include private, but not public, corporations.

In Vermont and Wisconsin the same rule as last stated prevails: *Bradley v. Town of Richmond*, 6 Vt. 121; *Burnham v. Fond du Lac*, 15 Wis. 193; *Buffham v. City of Racine*, 26 Id. 449.

STATE MAY SUE OUT GARNISHMENT: *People v. Johnson*, 14 Ill. 342.

UNITED STATES MAY SUE BY ATTACHMENT: *United States v. Murdock*, 18 La. An. 305.

SOVEREIGN NOT BOUND by general words in a statute: *The People v. Herkimer*, 15 Am. Dec. 380, note.

See generally, as to suits against the sovereign, notes to *Gregg v. James*, 12 Am. Dec. 153, and *Orleans Nav. Co. v. Schr. Amelia*, Id. 517.

FOSTER v. FLETCHER.

[7 T. B. MONROE, 534.]

POSSESSION—GROWING CROPS.—A person can not be in possession of land, and another of the corn growing on it.

SHERIFF'S RETURN—IF REPUGNANT, WHAT PORTION PREVAILS.—In a sheriff's return of the execution of a writ of possession, certifying he had delivered the possession of the land, a clause stating he had excepted for the defendant the growing crop thereon, is repugnant and void, and plaintiff is entitled to possession of all.

TRESPASS.—To maintain trespass, plaintiff must have possession.

APPEAL from the Nicholas circuit. Trespass. The facts appear from the court's opinion.

Crittenden, for appellant.

Triplett, contra.

By Court, OWSLEY, J. Fletcher sued Foster in trespass *vi et armis*, and declared against him for having with force and arms, taken, carried away, and converted to his use, two hundred barrels of corn, of which Fletcher is alleged to have been the rightful owner, and peaceably possessed.

The trial was had on the general issue, with leave to give in evidence anything that might be especially pleaded, and verdict and judgment for one hundred and forty-five dollars were recovered by Fletcher.

It is unnecessary to notice each of the various questions of law moved at the trial, and decided by the court, because there is one which, upon principles familiar in practice, must be adjudged to have been erroneously decided, and will, we apprehend, be conclusive against the right of Fletcher, to recover in the present form of action. To that question, therefore, the few remarks we shall make will be directed.

The facts out of which the question arose were proved to be substantially these: In 1820, Fletcher was living on a tract of land in the county of Bath, planted a part thereof in corn, and continued to reside thereon and cultivate the corn until about the middle of July in that year. Prior to that year, there was depending in a court of competent jurisdiction, between Foster and his wife, and Leonard Turly, a traverse to an inquisition taken under a warrant for forcible detainer, sued out by Mrs. Foster before her marriage with Foster, and judgment for restitution having been rendered therein against Turly, after the corn was planted by Fletcher, a writ of restitution was sued out on the judgment in favor of Foster, directed to the county of

Bath, under which the sheriff, to whom the writ was directed, entered upon the land occupied by Fletcher, turned him out of the possession, and delivered the possession thereof to Foster. The sheriff made upon the writ of restitution the following return, to wit:

“ The within named Leonard Turly is no inhabitant of Bath county, and the within named David Foster and wife represented certain premises to me, lying on the waters of Flat creek, in Bath county, to be the same, in this writ mentioned, which are now occupied by Wm. Fletcher, who they also represent to be privy to Turly; and the plaintiff, Foster, went on the premises and commanded me to give him possession of the same, which I did, agreeable to the command of the within writ, on the seventh of July, 1820, except the crop on the ground, which, by the consent of the plaintiff, was reserved for the said William Fletcher.”

On being dispossessed, Fletcher left the plantation, did nothing more in cultivating the corn, which was then sufficiently tended, and removed with his family to the distance of two or three miles therefrom; but he occasionally passed through the plantation, and requested Wilson, the tenant then upon the place under Foster, to take care of the crop.

Immediately on receiving the possession by the sheriff, Foster leased the plantation to Wilson, who, as tenant to Foster, entered thereon, and has continued in possession thereof ever since. In the autumn of 1820, after the corn, which was growing upon the land when possession was delivered by the sheriff, had become ripe, Foster, claiming it as his own, went into the field, gathered it, and has converted it to his own use.

It is for thus gathering and converting the corn by Foster to his use, that the present action was brought by Fletcher; and the question to which we have alluded is, Can the action upon the preceding facts be sustained? Or, in other words, assuming the facts to be true, will trespass *vi et armis* lie against Foster for gathering and carrying away the corn, and should not the court have instructed the jury to find as in a case of nonsuit?

Nothing is more clear than that at the time the corn was gathered it was neither actually nor constructively in the possession of Fletcher. The sheriff seems to have entertained a notion that while one is possessed of land another may have the possession of corn growing upon it, and in his return, after stating that he had delivered the possession of the land agreeable to the command of the writ, he has gone on to except the

crop on the ground. But we know of no rule or principle of law by which the possession of a crop growing upon land can be separated from the land, so as to place the possession of the land in one, and the crop in another. The crop, while growing, is attached to and composes part of the land, and must necessarily be in the possession of whomsoever the land is possessed.

The exception as to the crop mentioned by the sheriff in his return is therefore obviously repugnant to the body of his return, by which the premises is stated to have been delivered to Foster, agreeable to the command of the writ, and being repugnant, can not, in opposition to the other parts of the return, be admitted sufficient to prove possession of the crop in Fletcher. Were such a repugnant exception admitted to have any influence (and whether or not, we shall not stop to inquire), it might possibly destroy entirely the effect of the return as evidence, but could not, upon any rational principle, establish the possession of the crop to be in Fletcher; and the return out of the case, the other facts are conclusive to show that Fletcher was neither actually nor constructively possessed of the land or crop when it was gathered and carried away by Foster. Having failed to show that he was possessed of the corn at the time the injury complained of by him was committed, it is perfectly clear that Fletcher has shown no right to maintain his action of trespass *vi et armis*, and that the court should have instructed the jury to find as in case of a nonsuit. For there is no rule of law better settled, and none more frequently recognized and acted on, than that which makes it necessary for a plaintiff, in order to maintain trespass, to have been in possession at the time the injury was committed.

The judgment must be reversed, with costs, the cause remanded to the court below, and further proceedings there had, not inconsistent with the principles of this opinion.

TRESPASS—TITLE NECESSARY TO MAINTAIN.—*Hostler v. Skull*, 1 Am. Dec. 587; *Putnam v. Wyley*, 5 Id. 346; *Carson v. Noblet*, 6 Id. 554.

See, as to when judgment in ejectment entitles a person to the growing crop, *Van Alen v. Rogers*, 1 Am. Dec. 116, note.

JANUARY v. JANUARY.

[7 T. B. MONROE, 542.]

AN ACT OF THE LEGISLATURE directing sales under decrees in chancery on longer credit than was allowed at the date of the contract is unconstitutional.

EQUITY JURISDICTION.—When a demand, purely legal, is secured by a mortgage, equity will not enforce it further than to subject the mortgaged estate to its satisfaction; but in cases where equity has jurisdiction to rescind or enforce a contract for land, and a sale is ordered, a decree *in personam* will be entered for any balance that remains.

IDEM.—Courts of equity have concurrent jurisdiction with courts of law in cases of sureties against their principals.

ERROR to the Mason circuit. Bill in chancery. The opinion states the case.

Haggin, for plaintiff.

Crillenden, for defendants.

By Court, BIBB, C. J. In the year 1818, Samuel January sold to Thomas H. January part of lot No. 13, with the buildings thereon, in the town of Maysville, for nine thousand dollars, payable in installments, all of which were paid except the last and a fraction of the next preceding one, which is now part of the subject of controversy. Samuel gave his bond to convey the lot, and took simple notes for the purchase-money, without any other security. Thus holding the equitable claim by bond only, Thomas conveyed the lot to Lytle & Steele, of Ohio, to indemnify them against the consequences of becoming his bail in an action commenced against him in that state. They had the money to pay after it was recovered against them by judgment, as his bail, whereby the mortgage became forfeited.

In the year 1822, Samuel January filed this bill, making both Thomas H. January and Lytle & Steele defendants to enforce the lien which he held on the estate for the purchase-money unpaid, suggesting the insolvency of Thomas.

Lytle & Steele admit the superiority of the lien of Samuel January, and pray that they may come in next to him for satisfaction in the sale of the estate, and they add to their answer a cross bill for that purpose.

Thomas H. January questions the title of Samuel, prays a rescission of the contract, and that the money which he has paid may be restored, and enough of it paid to Lytle & Steele to satisfy their claim, which he admits to be valid.

The court below settled the account between Samuel and

Thomas H. January, as well as between Lytle & Steele and Thomas H. January, and decreed a sale of the estate, and the demand of Samuel January to be first satisfied; and Thomas H. January has prosecuted his writ of error.

We have not thought it necessary to recite in detail the controversy relative to the validity of the title. It involves, in this respect, no question new or difficult, and, moreover, rests chiefly on facts, a report of which could be of no use as a precedent. Nor do we see any error in settling the accounts between the parties, which is questioned by the assignment of error. Suffice it to say, that on these points the court below seems to have decided correctly, and to have committed no error of which Thomas H. January could complain. But the court nevertheless has erred to his prejudice, in making their decree, in other respects. Time for payment or redemption indeed was given, but the court seem to have turned the residue of the controversy out of doors to be settled between the commissioner and parties. The former was to judge of the payment and tender, and to determine accordingly whether the estate should or should not be sold. This ought to have been settled according to repeated decisions of this court after the day of payment expired in term time, and the power to adjudicate thereon could not be delegated to a commissioner.

As the decree for this cause must be reversed, we proceed to notice another error committed against the complainant, as well as the defendants, Lytle & Steele. They were subjected to a credit, according to the act of assembly, unless they would accept bank paper, longer than the law allowed, when the respective contracts between the respective parties were made, when, according to the repeated decisions of this court, the acts of assembly in question could not constitutionally operate on contracts made before their passage, or render such contracts more worthless by extending the time of payment.

It is objected that the court erred in decreeing the amount to be paid to Samuel January positively, and that it ought only to have enforced the lien, and left the complainant to his remedy at law to recover the balance, if the estate, when sold, should fall short of satisfying the demand. We think differently. It is true that under the principles of equity, a court of chancery, when a demand purely of legal cognizance is secured by a mortgage, will not enforce it further than to subject the mortgaged estate to its satisfaction. But this is a contract for land, of which equity has jurisdiction, either to enforce it in

favor of either party, or to enforce any lien necessary to its completion; and in such case, when chancery takes hold of the subject, it will finish it by an entire decree, subjecting the estate mortgaged and decreeing the balance to be paid.

As to the claim of Steele and Lytle, who also, by their cross bill, stand in the attitude of complainants, their claim has arisen against Thomas H. January for money paid by them for him as his sureties, and of such a claim chancery has complete jurisdiction to decree the amount thereof. A bill in equity was formerly the proper remedy in such case, and at length courts of law took up the subject and afforded a remedy; but this did not divest the chancellor of his powers over it. The court, therefore, did not enforce either claim beyond its powers. But because the decree is erroneous on the other grounds already stated, it must be reversed with cost, and the cause be remanded that such decree and proceedings may be had therein as shall conform to this opinion.

ESTILL v. FOX.

[7 T. B. MONROE, 552.]

QUI TAM ACTIONS—STATUTE OF LIMITATIONS.—In actions *qui tam*, the defendants could not have been indebted to the plaintiff before the commencement of the action, consequently a plea that the defendants were not indebted to the plaintiff within three months before the commencement of the action, is insufficient.

STATUTES OF LIMITATIONS may be relied on in penal actions, under the general issue.

ERROR to the Madison circuit. Debt. Estill brought the action for himself and the Madison Seminary. The other facts appear from the court's opinion.

Turner, for the plaintiff.

Breck and Caperton, contra.

By Court, OWSELEY, J. The plaintiff declared against the defendant, in debt, for two hundred and forty dollars, bet at games of cards by the defendant and a certain William Day. The one moiety thereof is alleged to have been bet by the defendant, and the other by Day, who, after having lost his bet, is stated to have paid the amount to the defendant, etc.

The defendant pleaded two pleas; to the first of which issue was taken by the plaintiff to the country, and to the other he

filed a demurrer. The demurrer was joined by the defendant, and the plea adjudged good by the court.

The correctness of that decision is the only question made by the assignment of errors.

The plea is in the following words: "And for further plea in this behalf, the defendant says, *actio non*, because he says that he was not indebted to the said Estill and the trustees of the Madison Academy, or either of them, the bank notes and money in their declaration mentioned, or any part thereof, within three months next before the emanation of the plaintiff's original writ herein; and this he is ready to verify," etc.

This plea is one of a most singular and novel charcter, and contains no statement which can, upon any legal principal, form any good defense to the plaintiff's action. In actions of this sort, brought by a common informer, to recover a forfeiture declared by statute, no right to the thing sued for attaches to or vests in the plaintiff before suit brought. The right to recover the thing forfeited is given by the statute to whomssoever may sue, and it is by the act of commencing suit, and by that only, that the right to the thing vests in the plaintiff. Until the action was commenced by the plaintiff, therefore, the defendant could not have been indebted to him the commonwealth's bank paper mentioned in the declaration, though it were forfeited; and of course the denial in the plea by the defendant, that he owed to the plaintiff or the trustee the debt, or any part thereof, within three months before the commencement of the action, is a denial of nothing inconsistent with the plaintiff's right to maintain his action, and nothing that can form a bar to his action.

It is suggested in the brief made out by counsel, that it was designed by the plea to rely upon the limitation of three months from the time of the forfeiture before action brought, in bar of a recovery; but if such was the object intended, the plea is certainly illy adapted to the purpose, and can not be considered as having presented that question in a shape to be judicially noticed.

But, though not presented by the plea, the question is one that may arise on the return of the cause to the court below. The general issue is also pleaded; and the doctrine is well settled, that in actions on penal statutes, it is not necessary for the defendant to plead the statute of limitations; but he may use it in evidence on the trial of the general issue.

It is therefore proper that we should now determine whether,

after the lapse of three months from the time of forfeiture, the action can be maintained to recover the thing forfeited.

It is undoubtedly true, that by the act of 1798, no action could be maintained to recover the thing lost at any game or games whatever, after the expiration of three months; so that if the limitation prescribed in that act is to control the present action, the question must be decided in the negative. But it will be perceived, by turning to that act, that it applies only to actions which may be brought to recover something lost at games and actually delivered or paid. Until the thing lost is actually delivered, no action can, according to the provisions of that act, be brought by any person to recover it, nor can the limitation prescribed by that act commence running before the thing lost is delivered.

It is not, however, upon any of the provisions of that act that the right of the plaintiff to recover in this action is founded. It is not because the thing sued for was actually lost at any game that the plaintiff has brought his action, but it is because the thing sought to be recovered was bet at games, and therefore forfeited by the express provisions of the fourth section of the subsequent act of 1799. This latter act contains no provision as to the limitation of time in which the action to recover the thing forfeited must be commenced; but the act is penal in its nature, and the time in which the action should be brought must, we apprehend, be governed by the general limitation applicable to actions founded on statutes of that description. It might be otherwise if, according to any fair and reasonable construction, the limitation prescribed in the act of 1798, could be applied to actions founded on the act of 1799. But this can not be consistently done. The action which is given by the latter act is not made to depend upon the happening of those events which are necessary to authorize an action under the former act; nor is it necessary to maintain the action under the latter, that the plaintiff should establish those facts from the occurrence of which the limitation prescribed in the former act is made to commence.

It results, therefore, that three months is not the limitation by which actions founded on the act of 1799 are governed.

The judgment must be reversed with cost, the cause remanded to the court below, and further proceedings there had, not inconsistent with this opinion.

NANTZ v. McPHERSON.

[7 T. B. MONROE, 597.]

BONA FIDE PURCHASER, PLEA OF, WHEN AVAILABLE.—To make the plea of a *bona fide* purchase, without notice, available, the want of notice must be denied positively, and the person pleading it must have completed his purchase by paying all the consideration, and receiving his conveyance; and if, before either of these events, he had received such information as would put a prudent man upon inquiry, his plea must fail.

RELEASE—A DECREE FOR A RELEASE will be granted against a person having a conveyance from a common grantor of elder date, but in fact subsequently executed, to one having the elder legal title.

PRACTICE—CONSENT BY A DEFENDANT that a bill confessed by a co-defendant may be read and taken as evidence against him, is an admission of the allegations of the bill.

ERROR to the Logan circuit. Bill in chancery.

Crittenden, for plaintiff.

Mayes, *contra*.

By Court, **MILLS, J.** Samuel H. Curd, being seised of a tract of land, sold and conveyed it to William Stewart; Stewart sold and conveyed it to William Harrison, who sold and conveyed it to Thomas W. Nantz, who filed this bill, setting forth the aforesaid title, and alleges that Evan McPherson also sets up title to the same land by conveyance from the same Samuel H. Curd, and asserts title thereto by virtue of Curd's deed; represents his own as superior in both law and equity, and by thus slandering his, the complainant's, title, destroys its value, and prevents his selling of it, although he has the possessions. He makes McPherson defendant, and prays that he may be compelled to disclaim or relinquish his title.

McPherson answers and admits that he holds a deed from Curd for the same land; insists that his equity was prior to the claim of the complainant, derived through Stewart and Harrison from Curd, and also charges that he obtained a conveyance from Curd, which was deposited in the office to be recorded, but was lost before it was recorded, and then Curd executed his present deed, which is recorded; and he charges that Stewart and Harrison deluded Curd into executing their deed, he not believing it was the same land, and that he would not have executed it, had he not been defrauded into the measure. He also charges that Stewart, Harrison, and Nantz each had full notice of his equity before either of them received their respective titles, or paid the purchase-money, and also that his

present deed was in fact executed before the deed of Curd to Stewart, and that the latter deed was antedated before his conveyance from Curd, and that all their acquisition of title was a combination to defraud him out of his land. He makes his answer a cross bill, and makes Nantz, Stewart, Harrison, and Curd defendants thereto; prays for a release of the complainant's title; and if that can not be granted, that a decree for the value of the land may be rendered in his favor, against Harrison, Stewart, and Curd.

Harrison, Stewart, and Curd never answered this cross bill, although served with process, and it was taken for confessed against them.

Nantz answered, denying at the time of his purchase he had any knowledge or intimation whatever that McPherson had any claim; but admits that a short time before he received his conveyance from Harrison, in a conversation with McPherson, he was informed that he, McPherson, had a claim to the land, and that he had purchased it from Curd, and he immediately stated this fact to Stewart, under whom Harrison, his immediate vendor, held, and that Stewart assured him that the conveyance of him (Stewart) from Curd was prior to the conveyance of McPherson; and to prove that fact referred him to the county court office, where the two conveyances, from Curd to Stewart, and from Curd to McPherson, were recorded, and that on searching there, he found that Stewart's statements were true. He denies any knowledge of any bond for the conveyance from Curd to McPherson, or that he had a prior deed executed, which was filed in the office and lost. He says that he can not admit that the deed of Stewart was antedated, and that Stewart had no right at the date of the purchase of McPherson. He alleges that he is a *bona fide* purchaser from Harrison, and has paid the consideration.

He, Nantz, prays that Harrison may be a defendant to his answer, and that if he loses the land, Harrison may be decreed to refund to him the price paid, with interest. But in this answer he took no steps against Harrison, and never served process on him.

After the cross bill of McPherson was taken, as confessed against Curd, Stewart, and Harrison, and before the hearing, Nantz entered on record the following admission:

" Thomas W. Nantz does not object in this case to the answers of Stewart and Harrison being read as evidence against him, nor does he object to the confession of said McPherson's

cross-bill against said Stewart and Harrison, by their failing to answer, being read and taken as evidence against him, but waives that rule of law which excludes it."

No depositions were taken, except one or two, proving Nantz to be in possession of the land.

The court below decreed that McPherson should release and convey his title to Nantz, and that Curd, Stewart, and Harrison should pay the value of the land to McPherson, because they had fraudulently got the title from him. This value was ascertained by a jury, and decreed accordingly. To reverse this decree, Nantz, Curd, Stewart, and Harrison have prosecuted their writ of error.

Assuming the fact to be that McPherson had a good equity for the land, it would be difficult to screen Nantz from the effect of notice of that equity under the admissions of his answer.

To make the plea of a *bona fide* purchase, without notice, available, the want of notice must be denied positively, and the person pleading it must have completed his purchase by paying all the consideration, and receiving his conveyance.

If, before either of these events, he had received such information as would put a prudent man upon a search for the truth of the case, he will be affected by it, and his plea must fail. Here Nantz admits that he did inquire, on receiving the information from McPherson, and that his inquiry ended in ascertaining, by the directions of Stewart, that the conveyance under which he held was prior in date to the conveyance of McPherson.

But there is something more dangerous to Nantz than a mere equity. The fact is charged that the conveyance of Stewart was antedated so as to overreach that of McPherson, which in fact was prior in point of time. Although Nantz claims under this conveyance from Curd to Stewart, yet it was executed before he had any knowledge on the subject, and he does not pretend to have any. If the fact that this deed of Curd to Nantz is the eldest be true, then Nantz will be affected by it, whether he knew it or not. It would give to McPherson the oldest legal title, and entitle him to a release of that which appeared to be the oldest, but in truth was not.

This leads us to inquire what is the effect of the admission on record, that the silence of Stewart and Harrison may be used as evidence against him. As to Stewart and Harrison, without this admission, the facts must be taken as concluded, that Mc-

Pherson has the oldest equity, and also the oldest legal estate, and that the conveyance of Stewart is younger than that of McPherson. The admission of Nantz, therefore, can be nothing less than permitting these facts to bear against him as if proved.

And this subjects Nantz to a decree compelling him to surrender his apparent legal estate. We shall remark that the deed to Stewart from Curd, though placed on record by acknowledgment, was not acknowledged before the clerk for several months after its date, and no witnesses thereto appear on the deed; so that the conveyance to McPherson comes in between its date and acknowledgment, a circumstance not unfavorable to the fact of its being antedated.

It follows, then, that instead of McPherson being compelled to surrender his title, Nantz ought to be compelled to surrender his, with the possession of the land, and that the decree against Curd, Stewart, and Harrison is erroneous; and Nantz must be left to pursue Harrison, and his preceding warrantors, at law, especially as he has not brought them before the court, in such an attitude as to obtain a decree against them, or either of them.

Decree reversed, with costs, and cause remanded, with directions to enter up a decree in the court below, in conformity with this opinion.

PURCHASER FOR VALUE, to what extent protected: *Jones v. Zollicoffer*, 7 Am. Dec. 714, note; *Gallion v. McCaslin*, 12 Id. 212, note.

BLIGHT'S HEIRS v. TOBIN.

[7 T. B. MONROE, 612.]

EXECUTION SALES—**EQUITY HAS JURISDICTION TO SET ASIDE** sales of land under execution, where fraud exists, but in so doing it does not act as a revising court over the records of a court of law in executing their process, but it will treat all the proceedings at law as valid, although erroneous, and will relieve against the consequence thereof, because the rights acquired thereby can not be retained in conscience, but the purchaser will not be compelled to do equity until he receives equity.

IDEM—**RELIEF GRANTED BY COURTS OF EQUITY** in avoiding execution sales on the ground of fraud, is not limited to the period provided by statute within which courts of law may correct the abuse of its process.

IDEM—**PURCHASE AT, BY ATTORNEY FOR PLAINTIFF**.—Whether a purchase by the attorney for the plaintiff in execution, of lands sold at a sheriff's sale, is invalid or not, such purchase is a circumstance to induce the court to examine the same with greater strictness.

INADEQUACY OF PRICE, *per se*, may not be sufficient to overturn a sheriff's sale, yet it is a circumstance that will be considered and weighed with other circumstances from which fraud may be inferred.

ACTS OF ONE PARTNER in effecting a fraudulent purchase of lands at sheriff's sale, is binding on all the partners.

PURCHASER WITHOUT NOTICE OF FRAUD, PROTECTED.—A vendee, without notice of a fraudulent purchase at sheriff's sale, is not affected thereby, but the purchaser under the execution must account for the proceeds of his sale to the former owner.

REDEMPTION IN EQUITY, WHEN ALLOWED.—Equity may permit a redemption of land sold under execution, on the ground of improper conduct on the part of the sheriff and purchaser, although a court of law would not set aside the sale.

PURCHASERS AT SHERIFFS' SALES are not affected by irregularities of the officer, but the officers are liable to the party injured; but where the purchaser conducts the sale, and knows of the irregularities, equity may compel him to surrender the title on receiving his money back.

WRITS of error to the Hardin circuit. Bills in chancery. The opinion states the case.

Darby, for complainants.

Wickliffe and Mayes, *contra*.

By Court, MILLS, J. Samuel Blight, a citizen of Pennsylvania, held claims to a considerable quantity of lands in this state, situated principally in the county of Hardin, but extending largely into the counties of Hart and Grayson; and he came to this state and took up a temporary residence in Hardin county, and boarded with his family at a public inn in Elizabethtown, for the avowed purpose of investigating his land claims and settling his business here.

On the seventeenth of March, 1820, he constituted Benjamin Tobin, a practicing lawyer resident of Hardin county, his agent, by letter of attorney, authorizing Tobin to lease his lands, to receive and recover rents, by law or otherwise, and delivered to him sundry notes, leases, etc., evidences of rent due. Tobin was to receive one third collected for his services. Tobin also acted as attorney at law for Blight in sundry suits, chiefly, if not entirely, for rents due, in some of which he was successful, and in others not.

Tobin also brought against Blight, as attorney and counselor at law, an action of debt, by petition, in favor of David Simpson, and recovered a judgment therein against Blight for ninety-three dollars and fifty cents, with interest from the fourth of September, 1822, until paid, and about seven dollars and sixteen cents costs. This judgment was obtained at the

March term, 1823, in the Hardin circuit court, where both Blight and Tobin then resided. On the twenty-fifth of March, 1823, Tobin caused the first execution to issue on this judgment, directed to the sheriff of Grayson, an adjoining county, indorsed that notes of the bank of the commonwealth would be received in payment, that kind of paper being then at a depreciation of about two dollars for one. This execution Tobin carried to the sheriff, and caused him to levy it on all the lands of Blight extending into Grayson county, which was not measured, but bounded by the county lines and the lines of the original surveys, and containing some uncertain quantity, of from eight to twelve thousand acres, all of which in the lump was sold by the sheriff, and Tobin became the purchaser at the price of about thirty dollars, in said bank paper; and he received the conveyance of the sheriff for the whole. This execution was not returned until the thirty-first of July, 1823. On the twenty-first of June preceding, and upward of a month before the first execution was returned, Tobin issued a second execution, directed to the sheriff of Hart county, which he caused to be levied on the lands of Blight, extending into that county also, amounting to ten thousand acres or upwards; and the whole thereof, bounded by the county lines and the original lines of the surveys, without measurement, was sold under the direction of Tobin, and George T. Wood became the purchaser, and received the sheriff's deed thereto, for the joint benefit of himself, Tobin, and a certain Thomas Johnson, at the price of fifty-five dollars and twelve cents, in paper of the bank of the commonwealth.

Tobin, also, as attorney or counselor at law, obtained another judgment against Blight, in favor of Southard and Starr, the amount of which was replevied by Blight; and on the tenth of December, 1823, an execution was issued on the replevin bond against Blight and his sureties, for the sum of eighty-seven dollars and eighty-four cents, debt, with interest and costs, directed to the sheriff of Hardin county; and Blight, to save his sureties, in writing, surrendered one thousand acres of land to the sheriff, who levied thereon, as well as on some personal estate, there being one other execution levied at the same time; and the one thousand acres of land was sold, and Tobin became the purchaser, at the price of fifty-one dollars, in paper of the bank of the commonwealth, and received the conveyance from the sheriff.

To set aside these sales and conveyances, Blight brought the two suits in equity now under consideration.

In the one he included the first and last of the afore recited sales, making Tobin a defendant, and those who purchased from him.

In the second suit, he embraced the second sale only, and made Tobin, Woods, and Johnson, defendants.

All these sales are attacked upon the ground that they were secret, carried on with address, and fraudulent and illegal; and also on the ground that Tobin was his agent to protect and preserve those very lands; that he had received more money of his than was sufficient to pay the executions, and held it then in his hands, and ought to have paid the executions, and therefore he made the payments under circumstances that constituted Tobin his trustee; and that he ought to surrender the title acquired by the most enormous sacrifices, and at unconscientious prices.

Tobin, as well as the other defendants, contest all these grounds, and insist upon the title as their own.

On hearing, the court below set aside the first sale, made in Grayson county, and decreed a release thereof, and refused to set aside the sale of the one thousand acres, made in Hardin; and this composed the decree in the first-named case, to reverse which, both Blight (or his heirs since his death) and Tobin prosecute their respective writs of error; the first complaining that the court did not set aside both sales, and the latter that either was set aside.

In the second suit, the court refused to set aside the sale to Wood, Tobin, and Johnson, in Hart, and dismissed the bill; and to reverse that decree, Blight's representatives have prosecuted their writ of error.

We have considered these three writs of error together, as they depend on similar principles, although the circumstances of each sale are somewhat different.

A previous question, or two, applicable to each case, is made. It is insisted that the chancellor has no jurisdiction of this matter, and that it belongs to a court of law, and that the motion to set aside the sale not having been made in the court of law within one year, no remedy exists to annul the sale.

We can not concede that sales of land by *feri facias* constitute a mode of alienation over which courts of equity have no control. We can not expect to find precedents for such an exercise of jurisdiction in the English chancery, or in Virginia; because, that in these countries sales by *feri facias* were rare or

altogether unknown. But in the states which have introduced sales in satisfaction of debts by *fiery facias*, courts of equity have made them a subject of its revision, as is manifest by the cases of *Woods v. Morvell*, 1 Johns. Ch. 502¹; *Tiernan v. Wood*, 6 Id. 411²; *Troup v. Wood*, 4 Id. 228; *Howell v. Baker*, Id. 118; *Gist v. Frasier*, 2 Litt. 118. Analogous in the case of *Strael's Executors v. Couns*, 4 Cranch, 403³.

We do not mean that a chancellor, in exercising this jurisdiction, will act as a revising court over the records of a court of law in executing their process, or make further use of errors at law than to prove or disprove the fairness or unfairness of the sale. He will treat all the proceedings at law as valid, although error may appear therein, and will relieve against the consequences thereof, because the rights acquired thereby can not be retained in conscience; and in doing so, he will treat the purchaser as a trustee of the estate, and will not compel him to surrender it until equity is done to him.

In this respect, the proceeding is more favorable to the purchaser than in a court of law. His title is treated as legally valid, and his money is generally restored before he will be compelled to surrender it.

It is true, a court of law will correct the abuses of its process, and that where fraud exists. But as to sales of this kind, the motion for fraud is limited by statute to one year; but the omission to pursue this remedy in the year, is rather a reason for the interference of the chancellor than against it. For the limitation is not on the powers of the chancellor, but on those of a court of law; and the omission to pursue one remedy does not preclude a resort to the other, provided the case is otherwise proper for a court of equity.

On the merits of these sales a further preliminary observation is necessary. The person who was the legal purchaser at two of these sales, and a partner in another, was the counsel for the plaintiff in both the executions which were used.

It has been held, or at least said, by some chancellors, that a purchase by counsel in such circumstances ought not to be permitted to stand. The cases on this point are referred to by chancellor Kent, in the afore-cited case of *Howell v. Baker*, in which he descants with considerable severity on such purchases, and shows that authorities are not wanting to prove that the pur-

1. *Woods v. Monell*, 1 Johns. Ch. 502.

2. *Tiernan v. Wilson*, 6 Johns. Ch. 411.

3. *Stead's Executors v. Couns*, 4 Cranch, 403.

chasing attorney, in all such cases, must become a trustee for the original holder, and that redemption must be allowed. The reason of such a rule appears to be the same which forbids a sheriff to become a purchaser, by statute; or an executor or trustee to become a purchaser of articles of which he is the seller. The attorney for the plaintiff in an execution is supposed to have such a control over the sale as to come within the reason applicable to the actual seller, and therefore ought to allow a redemption.

But without approving or disapproving these authorities, and not wishing it to be understood that we go to the whole length of this doctrine, all the use we shall make of it is to show that the chancellor, if he does not carry out this doctrine, will scrutinize a purchase thus made by counsel with greater strictness than he would a purchase by one who had no control over the execution; and if there be circumstances or grounds to make such a purchaser a trustee, it will be done, securing to him all the money which he may have paid.

One circumstance attending all these sales is calculated to lay them under a weight of suspicion not easily removed, and the conscience of the chancellor will revolt at permitting them to stand as they are. The price is so small compared with the value of the land, and the sacrifice is so great, that it shocks the moral sense. The land in Grayson is proved to be worth something like five thousand or six thousand dollars specie, and it is purchased for about fifteen dollars. The land in Hart is of about the same value, by the proof, and it is purchased for about twenty-six dollars. The one thousand acres in Hardin are shown to be worth at least five thousand dollars, and it is bought for twenty-five or twenty-six dollars specie. The inadequacy of consideration, *per se*, may not be sufficient to overturn the sale; but it is a circumstance that weighs heavy, and requires but little addition from other circumstances to authorize the inference of fraud. Of the two sales made under the execution of Simpson of the lands in Hart and Grayson, but little need be said. These sales must be overhauled.

Besides the great disproportion of price, there was evidently some degree of both haste and address used in transmitting the execution out of the county, and out of sight of the defendant, Blight, to counties where he could not suppose they were gone, not for the purpose of making the money, because there was every reason to suppose the money could be made easier in the county where Blight was; but with the intention of making a

speculation out of his estate, and there the whole unmeasured and undefined quantity was set up and sold as a packed lot at auction, where the purchaser is afterwards left to examine and count what he has got. These, with other circumstances, forbid that either of these sales should stand, and the court below erred in refusing to direct a restoration of the title to that land sold in Hart, and bought by Wood.

There is one circumstance proved, touching that sale, more strong than any belonging to the sale in Grayson. A person made known, before the day of sale, his intention to attend and become a bidder. This was told by him to the counsel for the plaintiff in the execution, of whom he inquired the day of sale. He was flattered, in reply, with a partnership in the purchase, and told of the day of sale, when he might attend. He attended on the day pointed out, and the sale was over the day before, and he was laughed at because he came a day after the fair.

The only plausible reason on which we can suppose the court relied in sustaining this sale in Hart, while it set aside the sale in Grayson county, is that the purchase was legally made by Wood, who, with his partner, Johnson, is not proved to have been participating in, or privy to the improper management of the execution; but it is admitted by all three that Tobin is and was, at the sale, a joint partner in the purchase when made, and we can not sustain the principle, that one or more partners are to be saved in a speculation, when one of the parties most active in procuring it had acted improperly, merely because he or they were ignorant of the impropriety. Each partner must be bound by the act of one managing the matter in hand, and his title must stand or fall accordingly. The law will account them one person, and the improper acts of one must be the acts of all.

In the sale which the court did set aside, there is error in the details of the decree, which we feel ourselves bound to notice. After Tobin had received the sheriff's deed for the land in Grayson, he sold and conveyed part of the land to sundry persons, who are made defendants. These persons seem to have become purchasers of the title from Tobin, in the following way: They had previously purchased the land from some other persons, under what claim or title is not explained in this record. But their vendor, or his representatives, willing to secure them in their first purchase, bought in this title of Blight from Tobin, and paid him therefor five hundred dollars in paper of the bank of the commonwealth, and Tobin, by his or their direction, con-

veyed the title to these defendants, and each of them answers and denies all knowledge of fraud or improper practice in conducting the sale, and there is not the least proof that they had any notice or knowledge on this subject, except what the deed of the sheriff to Tobin conveys, which is fair on its face, and gives no intimation of any impropriety, except what the small price intimated; and this, we have seen, of itself does not establish fraud.

The court decreed against these defendants, that they should relinquish or convey back their title to the complainant by deed, with special warranty against themselves, and all claiming under them; "but not disturbing any prior or other title the said defendants may have had to said land before the said sale and purchase from the sheriff, but leaving the same as it then and before stood, unaffected by this decree."

Now, how these defendants could convey with warranty against themselves and those claiming under them, and yet be allowed to retain other claims to the land, is, to us, an inconsistency not reconcilable on the face of the decree. Moreover, how these defendants could convey a title from themselves, and yet retain a title in themselves, is a problem which is not easily solved; for we are not acquainted with the process of severing or splitting asunder titles, after they are united in the same person; but conceive the law to be, that if a purchaser holding one title honestly, acquires another dishonestly, so that he must surrender the latter to its true owner, his former title goes along with it; and the only way that he could excuse himself from such a consequence, would be to set up his first title, and show its validity and superiority, and, of course, that he acquired nothing by the last title, which he ought to surrender back. If, therefore, these purchasers from Tobin ought to convey, they could not retain previous titles to the land, as they have not set up and shown their superiority.

But we do not see the propriety of any decree against these defendants. So far as appears, they are innocent purchasers, without notice of any impropriety in the sale. The bill ought, therefore, as against these defendants, to have been dismissed with costs. But as Tobin held this title when he ought not, and has sold it to those innocent purchasers, by which Blight or his representatives have lost it, it follows clearly that he must account to Blight's estate for the value of the land so conveyed away by him, to be fixed at the time of assessment; and this is the decree which ought to be rendered as to this portion of the land, he conveying back the title as to the residue.

As to the last sale in the county of Hardin, of one thousand acres given up by Blight, it is a question of more difficulty, and is a case nicely balanced between an enormous and unconscientious speculation on one hand, and the imprudent conduct of Blight, and the stern law of the case, on the other. This was sold under the execution of Southard and Starr. The sheriff had this execution, which did not amount to one hundred dollars in bank paper, and also another of a larger sum, perhaps about five hundred dollars in favor of Southard alone, against Blight, at the same time, and both these executions were on replevin bonds, and indorsed that bank paper would be taken. The sheriff levied them both on two horses belonging to Blight, and Blight also, to save his securities in the replevin bond, gave up to the sheriff, by writing describing the land, this one thousand acres now in dispute, on which he had a tenant residing at the time. The sheriff, under both these executions, advertised the two horses for sale on the fourteenth of February, 1824, in Elizabethtown, and the land on the premises on the fifteenth of the same month, adding to the advertisement, that the land would be sold, "provided the personal property first named (to wit, the horses), and described, shall fail to satisfy the same." Before either day of sale, the larger execution was taken out of the way by an injunction. Why the horses were not sold on the fourteenth of the month, to satisfy the smaller execution of Southard and Starr, is not explained in the record. The day for the sale of the land, however, came, and the parties were all in Elizabethtown, and Blight seems to have been struggling to make some arrangement to save his land. A Mr. Bland was indebted to him, and to Bland he applied for the money. Bland applied to a Mrs. Vanmetre, who was in his debt, for the money. She had more than the necessary sum in paper of the bank of the commonwealth, which she offered to furnish to Bland, provided Bland would give her credit at the rate of two dollars on her bond, for three dollars in bank paper. This was greater than the usual rate of exchange. Bland was unwilling to give this unless Blight was willing to make this allowance, to which Blight disagreed, and thus part of the day was spent in chaffering about this money, and the sheriff urging Blight to get the money, or he would go and sell the land, and reminding Blight at the same time, that the proper time of the day for the sale of the land by law, would be over by the delay. Blight assured him that the money would be had, and asserted that he would take no advantage of the time of day, if the day passed

away and the land must be sold. The sheriff, vexed, at length determined he would go and sell the land, and gave notice to Tobin, the counsel for plaintiffs, that he was starting for the purpose, and Tobin started with the sheriff. Blight and Bland both started after them, and overtook them before they got to the ground, about seven miles from town. On the way, Blight, in an ill humor, reminded Tobin that he was acting as his enemy, when he professed to be his friend, and was his agent and counsel, and told him that he must discharge him from his service, as he wanted no such friends, or words to that import. When they arrived on the ground, the time of day fixed by law for selling the land was passed, and the number on the ground seems to have been the sheriff, Blight, Bland, Tobin, and the tenant of Blight, at whose house the sale was. Blight there tendered the horse which he rode, which was one of the same horses advertised as personalty before spoken of, to be sold in lieu of the land. The sheriff took the horse and began to cry him, and stated he could get no bid. The tenant of Blight then offered to bid, and Tobin then interfered and told the sheriff that he would render himself liable if he sold the horse, and the sheriff then gave back the horse to Blight, and set up the land for sale. Bland soon bid the debt for half the land, and when the land was struck off to him, told the sheriff that he had not the money with him, but the money was in town, and he would pay it as soon as they returned.

The sheriff refused to go to town, but required the money on the spot, which neither Bland nor Blight, for whom Bland had bid off the land, had with them. The sheriff accordingly set up the land again, and refused to cry the bids of Bland, and Tobin, without competition, bid off the land for fifty-one dollars in bank paper. After the parties returned to town, Bland and Blight offered to the sheriff the amount of the execution, and he refused to receive it.

We have come to the conclusion that the purchaser in this case ought to be construed into a trustee for the complainant, although there is some difficulty in saying that the purchase was against law; and we will add that there may be cases where the chancellor will interpose and permit a redemption of estates sold under execution, even when a court of law would refuse to set aside the sale as a fraudulent violation of law, because the chancellor may do complete justice by restoring the money paid, which a court of law can not do, and from the relation of the parties, equity may presume a trust which sometimes may be

come necessary to avoid an odious speculation on the distresses of the debtor.

Indeed, cases are not wanting where a party plaintiff has bought in property at an enormous sacrifice under execution, and the chancellor has directed it to be set up again at the price at which it was bought, and for as much more as would be bid, still preserving the interest of the purchaser by securing his money.

It is a settled rule that a purchaser is not bound, nor is his purchase affected by the irregularities of the sheriff in advertising and conducting a sale, and if injury results the party must take his remedy against the sheriff. Hence, courts of law but seldom set aside titles thus fairly acquired by an innocent purchaser acting under the confidence which ought to be reposed in the organs of the law.

But whether there might not be cases of that kind where the chancellor would construe such a title into a trust, we need not now inquire. Suffice it to say that in a case where the conductor and director of a sale, as Tobin was in this instance, knows of the irregularities of the officer, and that those irregularities had brought this land into market under circumstances which demanded so heavy a sacrifice, he ought to be compelled to surrender his title on receiving his money.

If the sheriff had proceeded with the sale of the personal estate at the proper hour there could have been no necessity of selling this land. The circumstance of omitting to sell the personalty and then insisting on the sale of lands of five thousand dollars in value, to satisfy an execution not amounting to one hundred dollars, at an hour when the attorney, who only could and did direct the sale, could purchase it at not much more than twenty-five dollars in specie, and that without competition, raises too violent a presumption of combination between the two to permit this sale to carry the title forever.

This conclusion is not a little strengthened by the circumstance of the attorney deterring the sheriff from selling the horse in order that the land might be sold. The fact was, the execution was laid upon the horse, and the authority of the sheriff to sell him was complete, and all that stood in the way of his sale then, before the land, as was the rightful course, was that the then time and place was not advertised. This, however, was waived by Blight. But the attorney, by his advice, defeated the sale of the horse and thus reached the land.

It is also proper here to take notice of the accounts of the par-

ties brought into view by the pleadings. Blight insists that Tobin has received more of his money than is sufficient to pay the price of this land, and has adduced proof of his receiving money to some amount. Tobin admits the receipt of some money, but alleges that Blight owed him for fees, and has proved that he acted as counsel for Blight so as to be entitled to fees to a greater value than what he has received; also that he has made some disbursements for Blight. If these services were rendered as counsel for Blight, in the recovery of rents only, then Tobin by the contract proved is entitled to one third only. If the services were rendered in other cases, then he is entitled to reasonable fees. As Blight, therefore, or his representatives, must restore the purchase-money paid for the land, scaled to its specie standard, so an account must be taken of the money of Blight collected by Tobin, allowing him one third thereof for his services as counsel so far as rent is concerned, and reasonable fees for other services; and Blight must also be charged with the price of the land, and if the balance be in favor of Tobin, the court below must see to the payment thereof before giving a decree for the title.

This account must be taken in the case wherein Blight was plaintiff, and Tobin, Morrison, Dewit, Wooldridge and others are defendants; in which Tobin, on the restoration of his money, must be decreed to release and convey the one thousand acres; and also that part of Blight's land lying in Grayson which he has not sold and conveyed to Wooldridge and others, and the bill must be dismissed as to Wooldridge, and the others, grantees of Tobin; and an assessment of the value of the land conveyed to them respectively by Tobin must be made by commissioners, and Tobin must be decreed to pay the amount thereof to Blight's representatives. Morrison and Dewit, who are mortgagees of the one thousand acres, and who profess their readiness to release it, must be decreed to reconvey without costs.

In the case where Blight is complainant, and Tobin, Woods, and Johnson are defendants, the defendants, on receiving the price paid by them, assessed in specie with its interest, must be decreed to reconvey all the lands lying in Hart county, with costs. The decree in the writ of error in *Blight's representatives v. Tobin, Wooldridge et al.* must be reversed, with costs, against all the defendants, except Morrison and Dewit, and the cause be remanded for proceedings not inconsistent herewith. In the case of *Blight v. Tobin, Wood, and Johnson*, the decree must

be reversed, with costs, and the cause be remanded for new proceedings not inconsistent herewith.

Tobin must pay the costs of the writs of error prosecuted by him in the suit of *Blight v. Tobin, Wooldridge and others*, as he has failed to prosecute it with effect.

A petition for a rehearing by counsel for the defendants was overruled, and the decision stands unaltered.

INADEQUACY OF PRICE, not sufficient to vacate contracts: *Beard v. Campbell*, 12 Am. Dec. 365; *Whitefield v. McLeod*. 1 Id. 650.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

MAYOR *v.* MORGAN.

[7 MARTIN, N. S. 1.]

THE CITY COUNCIL are, by law, judges of the election of their members.

NO MANDAMUS LIES TO COMPEL a city council to admit a member whom they do not think duly elected.

A SHERIFF WHO SERVES A DISTRINGAS to compel obedience to a mandamus in such case is a trespasser.

APPEAL from the court of the parish and city of New Orleans.
The opinion states the case.

Moreau, for the plaintiffs.

Livermore, *contra*.

By Court, MARTIN, J. Obedience having been refused by the city council to the peremptory mandamus issued by the court of the first district, commanding them to admit to a seat a person whom they had refused to receive, a writ of *distringas* was placed in the hands of the defendant, sheriff of the parish, who seized the revenues of the city. Whereupon the present action was commenced for an alleged trespass. He justified under the authority of the writ. The plaintiffs were nonsuited, and appealed.

Their counsel has assigned as errors in the judgment of the parish court: 1. That the appellee is liable in damages, because he was not bound to execute the writ, and could dispute the authorities of the district court; 2. That the parish court had jurisdiction to inquire into it.

There is not any doubt with us that a sheriff is bound to in-

quire into the authority of a court whose writ is put into his hands for execution, and that he is liable in damages for any injury resulting from his executing a writ issued by a court who has no jurisdiction of the case in which it issued. Hence, it follows that a court before whom a remedy is sought for such an injury, must necessarily inquire into the jurisdiction of the court from which the writ issued. The success of the appellants before us depends on their ability to show that the district court was without jurisdiction. Their counsel has referred us to the constitution, which provides that the citizens of the town of New Orleans have the right of appointing the several public officers necessary for the administration and police of the said city, pursuant to the mode of election which shall be prescribed by the legislature: Art. 6, sec. 23. To the sixth section of the thirty-fourth chapter of the acts of 1816: 1 Martin's Dig. 331, n. 38, which declares that the city council shall be judge of the elections of the mayor and recorder, and of its members. And to the eight hundred and seventy-third article of the code of practice, by which it is enacted that when the legislature has granted to a corporation the right to determine the validity of the elections of its members or officers, courts of justice shall not issue mandates to inquire into that fact. So the district court was ousted of all jurisdiction, if the legislature had the constitutional power of rendering the city council judge of the elections of its members; and the only question for our solution is, whether the sixth section of the act of 1816 be contrary to the constitution. If it be, it is void.

We are ready to admit that we have found this case one of considerable difficulty; and we at first concluded that the law was unconstitutional; because to inquire into, and finally determine on the rights of a party claiming a seat in the council, is the exercise of judicial power. To judge is to determine the rights of parties, and nothing else. We thought that the right, created by law, to take a seat in the body, of which the applicant for a mandamus asserted he was a member, could not be distinguished from any other right created by law—as the right of a child to a parent's succession, or any other which positive legislation confers. And we concluded that as the constitution has declared the judicial power shall be vested in a supreme and inferior courts, the judges of which must hold their offices during good behavior, and be appointed by the governor, with the advice and consent of the senate; the city council being composed of members appointed for a term of years, and elected

by the people of their respective wards, is not a body in whom judicial power could be constitutionally vested.

But this reasoning presupposed that the legislative, executive, and judicial powers of which the constitution speaks, are not merely the legislative, executive, and judicial powers of the state, exercised over every part of it, and over every individual, dwelling, sojourning, or accidentally being within its geographical limits, but included those which may be exercised by corporations, within certain divisions of the state, and over their respective members.

If it were true that judicial power cannot be vested in the city council, because, according to the constitution, judicial power must be vested in a supreme or inferior court, it would follow that the council could not exercise legislative powers and pass ordinances, because the constitution has declared that the legislative power is vested in a senate, house of representatives, and governor.

We think the constitution speaks of the powers of the state government only; that the legislature, in establishing corporations, may enable them to exercise subordinate legislation within a particular district over their members, and in regard to their rights and duties as corporators; that the exercise of this legislative power in the city council is not inconsistent with the exercise of judicial power under the authority of the state; that the legislature had constitutional power to enable the council to legislate on matters within the scope of the charter, notwithstanding the constitution has declared the legislative power shall be vested in a senate, house of representatives, and governor.

Likewise, as the council could not well proceed to business without ascertaining the rights of its members to their seats, the legislature had power to render it judge of the validity of their elections, and prohibit courts of justice from interfering with its decisions. There is not a greater incongruity in the council exercising, in this respect, within the city of New Orleans, a kind of judicial power than in exercising legislative powers, which, it is universally admitted, they may exercise in matters which are the object of the charter of the city. The constitution itself contains a clause that supports the position, that the powers it speaks of are state powers only. It disqualifies the mayor of New Orleans from sitting in the state legislature.

Now, in construing an instrument, it is a good rule to give effect to every clause, nay, every word of it. If the executive

powers, of which the constitution speaks, be not state powers only, the mayor, who exercises executive power in the city, was excluded by the clause which forbids any person from exercising both legislative and executive powers, and the clause which excludes him from the state legislature was absolutely useless. Its insertion favors the idea that the convention contemplated merely state powers. This reasoning has satisfied our minds. If it were not absolutely conclusive, it would create such a doubt as would forbid us to declare an act of the legislature unconstitutional.

This court, and every court in this state, not only possesses the right, but is in duty bound, to declare void every act of the legislature which is contrary to the constitution. The due exercise of this power is of the utmost importance to the people, and if it did not exist, their rights would be shadows, their laws delusions, and their liberty a dream; but it should be exerted with the utmost caution, and when great and serious doubts exist, this tribunal should give to the people the example of obedience to the will of the legislator.

It is desirable that for every wrong there should be a legal remedy in a court of justice. But in Louisiana the constitution has left every judicial power in abeyance, with the exception of that vested in this court, liable to be called into action, suspended or recalled at the discretion of the legislature. The supreme court, with one single exception, has no original jurisdiction, and the other courts have only that which the legislature has given them. We can justly boast of the goodness of our institutions, but they are human, and consequently imperfect. In the present case, the error of the city council, if it be one, in rejecting the claim of the applicant, can not be corrected in a court of justice. This is unfortunate, but the legislature has willed it, and it is not perhaps the only case in which a citizen seeking relief in the temple of justice of his country may find the divinity turning a deaf ear to his complaints, and her ministers powerless.

We conclude that the act of the legislature of 1816, did not violate the constitution; that the court of the first district was consequently without jurisdiction; that its proceedings were *coram non jndice*; that the appellee derived no authority from the writ of *distringas*, and was guilty of a trespass in seizing the revenues of the appellants.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the parish court be annulled, avoided, and reversed;

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that there be judgment for the plaintiffs; and that the case be remanded, with directions to the judge to ascertain the damages sustained by them in the premises, and that the appellee pay costs in this court.

ACTS, LEGISLATIVE IN THEIR NATURE, can not be controlled by writs of certiorari, prohibition, or mandamus. In the *Sinking Fund cases*, 99 U. S. 761, Judge Field defined what acts are legislative, and illustrated his meaning by reference to the enactments of state legislatures, in *Lane v. Doc*, 3 Scam. 238; *Jones v. Perry*, 10 Yerg. 59. He said: "The distinction between a judicial and a legislative act is well defined. The one determines what the law is, and what the rights of parties are with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it. Wherever an act undertakes to determine a question of right or obligation, or of property, as the foundation upon which it proceeds, such act is to that extent a judicial one, and not the proper exercise of legislative functions." And the well-settled understanding of ministerial acts is that they are such acts only as are performed as duties under the authority of a superior power.

Writs of certiorari, *Spring V. W. W. v. Bryant*, 52 Cal. 132; *Bennett v. Wallace*, 43 Id. 26; *People v. Board of Education*, Sup. Ct. of Cal. March term, 1880; *People v. Board of Health*, 33 Barb. 344; *People v. Board of Supervisors*, 43 Id. 234; *Stone v. Mayor of New York*, 25 Wend. 157; *People v. Mayor of New York*, 2 Hill, 9; *In re Saline County*, 45 Mo. 52; *Appeal of Commissioners*, 57 Pa. St. 452; Bac. Abr. tit. Certiorari; and of prohibition: *Ex parte Brandtacht*, 2 Hill, 367; *Quimbo Appo v. The People*, 20 N. Y. 540; *Thomas v. Mead*, 36 Mo. 232; *West v. Clark County Court*, 41 Id. 44; *Home Ins. Co. v. Flint*, 13 Minn. 244; *Dayton v. Paine*, Id. 494; *Hockaday v. Newsom*, 48 Mo. 196; *State v. Gary*, 33 Wis. 93; *Ex parte Edison*, 2 Gratt. 10; *Board of Commissioners v. Spiller*, 13 Ind. 235; *Spring V. W. W. v. San Francisco*, 52 Cal. 111; *People v. Board of Election Commissioners*, Sup. Ct. of Cal. March term, 1880, issue only to review judicial proceedings, and to restrain inferior judicial tribunals from exceeding their jurisdiction. Legislative acts can not be reviewed or restrained by these writs. In an opinion filed the twenty-second of March, 1880, in the case of *People v. Board of Education*, the supreme court of California determined that a writ of certiorari would not lie to review the action of the board of education of the city of Oakland approving the report of a committee appointed by it in favor of a certain series of readers to be used in the public schools of that city. The reason of the decision was that the act sought to be reviewed was legislative in its character, and not judicial. Thornton, J., quoting the definition of legislative and judicial acts above given, said: "The rule so clearly laid down by the learned justice, we adopt as correct. Testing the proceeding before us by this rule, it is obvious that the defendant in its action with regard to the books to be used in the public schools of the city of Oakland was not exercising judicial functions. There was no party before it upon whose rights it was passing with reference to any transaction whatever. Neither the party having a right to control the sale of one series of readers or the other was before it, prosecuting any right given to it by any law in existence. If present at all, the party was there as any other person had a right to be, urging the policy of adopting the one series of readers, and the impolicy of adopting the other. The board acted upon the proposition before it as one of policy or expediency, aiming to adopt that

which, in its judgment, would be best for the constituency which it represented. Its action was then political or legislative, and was in no proper sense judicial in its character. It is conceded that the board exercised its judgment in the action which it took, but this it was called to do in the exercise of its legislative functions. It is apparent that the exercise of judgment is not the criterion by which this proceeding must be viewed to determine its character. To render it the exercise of a judicial function, its judgment must act in a matter which is judicial in the sense above indicated: *People v. Bush*, 40 Cal. 344; *Spring V. W. W. v. Bryant*, 52 Id. 132; *The People v. Mayor*, 2 Hill, 9; *In the matter of Mount Morris Square*, Id. 14; *In re Saline County*, 45 Mo. 52; *People v. Livingston*, 43 Barb. 232."

In the following instances certiorari was denied, as the act sought to be effected thereby was considered legislative and not judicial: The resolution of a town meeting providing for raising money to pay bounties to volunteers into the military or naval service of the United States: *People v. Board of Supervisors*, 43 Barb. 234; the resolution of a board of health declaring a certain occupation within the limits of the city to be a nuisance, without notice to the party conducting the same: *People v. Board of Health*, 33 Barb. 345; an ordinance of the board of aldermen and assistants for the removal of an existing sewer and the construction of a new one: *People v. Mayor of New York*, 2 Hill, 9; an ordinance of the common council of New York city for the regrading and repaving of a street: *People v. Merriam*, Id. 14; a resolution or ordinance of the same council for the opening of a square: *In the Matter of Mount Morris Square*, Id. 14; a similar resolution for opening a street: *Dixon v. Cincinnati*, 14 Ohio, 240; the resolution and order of the board of supervisors of San Francisco directing the mayor to make connections with the pipes and mains of a certain water company, in order to obtain water for municipal purposes: *Spring V. W. W. v. Bryant*, 52 Cal. 132. In the course of the opinion delivered by Judge McKinstry in this case, it is observed, 137, 138: "It has always been considered by this court that the office of certiorari is to bring here for review the proceedings of governmental boards exercising a mixed authority only when the matter is one in which they have acted judicially. The resolution and ordinance sought to be annulled were attempts to make law, not to render a judgment under existing law. They may be obnoxious to the criticism that they were attempts to deprive the corporation of its rights and property without due process of law, and violative of constitutional principles; but neither this, nor the circumstance that they were not authorized by the city charter to buy them, can justify a review of the action of the board and mayor by certiorari." The preponderance of authority, however, though not questioning the rule that certiorari lies only in the case of judicial proceedings, inclines to the view that the resolutions and procedure of municipal corporations in opening streets and upon matters of like nature are so far judicial as to be reviewable on certiorari: 2 Dillon Municipal Corporations, sec. 740, and notes.

The supreme court of New Jersey has gone to the length of deciding that acts of a municipal corporation may be reviewed in that court by certiorari, whether such acts are judicial or legislative. The court considered an ordinance authorizing new improvements to be made, such as opening and paving a street, or constructing a sewer, by which the property of specific individuals is taxed to defray the expense thereof, to be a judicial act. But upon an attentive examination of the New York decisions above cited, as well as of their own earlier adjudications, the court concludes generally: "Whether, therefore, the act be regarded as judicial or legislative, the certiorari will lie

at the instance of the party aggrieved by it:" *City of Camden v. Mulford*, 26 N. J. L. (5 Dutch.) 49, 56.

Granting the view to be correct that the acts of municipal corporations in regard to opening and repaving streets, etc., are judicial acts, and capable of review under a certiorari, the wisdom of allowing the writ is thus strongly questioned in a California decision already referred to:

"Even if it should be admitted that the power existed in any of our courts to review the legislation of the supervisors of the city and county, whenever they may legislate with respect to a subject beyond their control, I can hardly conceive of a case in which the power should be exercised. The ordinary remedies afforded by courts of law and of equity would seem to afford a sufficient protection against such attempted legislation, and the writ of certiorari does not issue to such inferior boards as exercise special jurisdiction created by statute *ex debito justitiæ*, but only on application and cause shown. 'The reason is that these bodies exercise power in which the people at large are concerned, and great detriment or inconvenience might result from interfering with their proceedings.' *People v. Supervisors*, 15 Wend. 206, cited with approval by Wallace, C. J., in *Keys v. Marin County*, 42 Cal. 255. And as was said by Bronson, J., in *People v. The Mayor*, 2 Hill, 12, 'The allowance of the writ rests in the sound discretion of the court, and it has often been denied where the power to issue it was unquestionable, and where there was an apparent error in the proceedings to be reviewed.' See, also, 15 Wend. 198; 5 Barb. 43; 23 Wend. 277; 25 Id. 157. Assuming, therefore, that the power exists to review the resolution and order by means of the writ, I think the courts would best exercise their sound discretion by refusing to employ the power:" *Spring V. W. W. v. Bryant*, 52 Cal. 140.

THAT THE WRIT OF PROHIBITION WILL NOT LIE to arrest the progress of any legislation pending in a board authorized by the laws to legislate with respect to matters of public interest, was expressly decided in *Spring Valley W. W. v. San Francisco*, 52 Cal. 111. The petition for the writ stated that the board of supervisors of San Francisco had passed to print, and were threatening to finally pass, an ordinance commanding the mayor to cause connections to be made with the pipes and mains of petitioner, for the purpose of taking water for the city for municipal purposes, without paying therefor. This ordinance was the same one that was unsuccessfully sought to be set aside by resort to a certiorari, as stated in *Spring Valley W. W. v. Bryant*, Id. 132, *supra*. Said Judge McKinstry, on behalf of the court, in *Spring Valley W. W. v. San Francisco*: "In my opinion, the writ ought not to issue to arrest any legislation pending before a body authorized by the constitution and laws to legislate with reference to matters of public interest. Error committed by such bodies can not usually be corrected by resort to this extraordinary writ without great public inconvenience: *People v. Supervisors of Queens*, 1 Hill, 200. I know of no way in which it can be shown that the members of the board of supervisors threaten, in their official capacity, to pass an ordinance, and it must be presumed that the members of that legislative assembly will fully consider the question of the power to pass the order, as well as the merits of the order itself. It would not be a proper exercise of the sound discretion of the court to prohibit any consideration of a measure which, after discussion, might by amendment be deprived of its objectionable features, merely because, if passed finally as 'passed to print,' it would be in excess of the power conferred on the board by the city charter."

This authority was relied upon in *Maurer v. Mitchell*, 52 Cal. 289, where a prohibition was sought to restrain the tax collector from the collection of a

tax, imposed on certain property-holders for benefits received from municipal improvements. The writ was refused, because the act complained of was not judicial; and although the propriety of a writ in case of legislative acts was not touched upon, the correctness of the opinion which had denied a prohibition in such an instance, was not impugned. In *The People v. Board of Election Commissioners*, decided at the March term, 1880, of the supreme court of California, a writ of prohibition was refused to restrain the said board from proceeding with an election pursuant to a resolution and order thereof. It was declared that the action of the board was not judicial, and that, therefore, the writ would not lie. But the court refrained from expressing any opinion upon the character of the act of the board, whether it was legislative or ministerial. The two decisions, the one from 52 Cal., and the other from 53 Id., above cited, were relied upon, and in no degree questioned.

As was stated in the earlier portion of this note, the writ of prohibition issues in the case of judicial acts only. Whenever the writ has been prayed for to restrain the exercise of legislative functions, the courts generally, as in the decision of *People v. Board of Election Commissioners*, *supra*, and *Mealing v. Augusta*, Dudley, 221, have contented themselves with refusing the writ, on the ground that the act was non-judicial, without laying any special stress upon the principle that legislative acts could not be controlled by a prohibition; a proposition which must necessarily follow from the statement of the only case in which the writ could issue.

"AS REGARDS THE JURISDICTION OF THE COURTS BY MANDAMUS over legislative officers, while but few cases have occurred where judicial aid has actually been invoked against the legislative department, the question would seem upon principle to present no difficulties. * * * * And it may be asserted as a principle founded upon the clearest legal reasoning, that legislative officers, in as far as concerns their purely legislative functions, are beyond control of the courts by the writ of mandamus. The legislative department being a co-ordinate and independent branch of the government, its action within its own sphere can not be revised or controlled by mandamus from the judicial department, without a gross usurpation of power on the part of the latter. * * * Where, however, the duty required of the legislative officer is simply of a ministerial nature, not calling for the exercise of any especial legislative functions, nor involving any degree of official discretion, there would seem to be no impropriety in interfering by mandamus upon a failure to perform the duty." High on *Ex. Legal Remedies*, secs. 135, 136. This language, it is conceived, is applicable to all boards exercising a legislative power; and the distinction here suggested, that to such boards a mandamus may issue where the law imposes a plain and imperative duty upon its members, without calling upon them to exercise their judgments, whether or not the duty shall be performed, will be found to underlie the adjudications upon this subject.

The principle was applied in *Michigan City v. Roberts*, 34 Ind. 471, where it was determined that the courts could not, upon a proceeding by mandate, review the decision of the common council of a city incorporated under a general law, refusing to cause an improvement of a street, to be made and paid for out of the general funds in the city treasury, and compel the council to cause the improvements to be made and so paid for against their judgment, as to its expediency. It was recognized in *Wilson v. Mayor of New York*, 1 Hilton, 595, in regard to the common council's power to make new sewers, drains, and vaults, and to open new streets, and to pave old ones; and is laid down by Dillon, 2 *Municipal Corp.*, secs. 665, 669.

Mandamus is often resorted to to compel a municipal corporation to levy or to collect taxes for the payment of the public debt. Although the power of taxation is a branch of the legislative department of the government: *Heine v. Levee Commissioners*, 1 Woods, 246; S. C., 19 Wall. 655; *United States v. New Orleans*, 98 U. S. 381; yet it may be delegated to municipal boards, with the obligation to exercise the power for a specific purpose. Where it is a duty to impose a tax, and that duty is not performed, it may be enforced by mandamus. This duty, in a specified case, will be inferred from express language in a statute, or in the charter of the body, authorizing it to levy the tax: *Heine v. Levee Commissioners*, 19 Wall. 655; *Rees v. City of Watertown*, Id. 107; *Riggs v. Johnson County*, 6 Id. 166; *Supervisors v. Rogers*, 7 Id. 175; *Commissioners of Knox County v. Aspinwall*, 24 How. 376; *Von Hoffman v. City of Quincy*, 4 Wall. 535, where it was held that the repeal of the statute under which city bonds had been issued, and authorizing a local tax to pay therefor, would not affect the right of the holders of the bonds to compel the municipal corporation by mandamus to levy the tax: *Supervisors v. United States*, Id. 435, where the power to levy the tax had been given to the supervisors with a "may, if deemed advisable," and it was construed to be mandatory and not discretionary: *City of Galena v. Amy*, 5 Id. 705.

In all of the foregoing decisions relative to taxation, the power to levy the tax was conferred by the manifest language of the statute of the state, or of the charter. Recent adjudications go much further and grant a mandamus to compel the levy of a tax, for the discharge of the indebtedness of a municipal corporation, although the power to levy the tax was not given in terms. In *United States v. New Orleans*, 98 U. S. 381, a petition for a mandamus was granted to compel the authorities of the city of New Orleans to levy a tax, for the payment of certain bonds issued by the city, and upon which judgment had been recovered. The circuit court refused to grant the writ, conceiving that payment of the bonds had been provided for out of the stock of the company. In the course of the opinion of the court, delivered by Judge Field in the United States supreme court, it was said:

"The position that the power of taxation belongs exclusively to the legislative branch of the government, no one will controvert. Under our system it is lodged nowhere else. But it is a power that may be delegated by the legislature to municipal corporations, which are merely instrumentalities of the state for the better administration of the government in matters of local concern. When such a corporation is created, the power of taxation is vested in it as an essential attribute for all the purposes of its existence, unless its exercise be in express terms prohibited. * * * A municipality without the power of taxation, would be a body without life, incapable of acting, and serving no useful purpose. For the same reason, when authority to borrow money or incur an obligation, in order to execute a public work, is conferred upon a municipal corporation, the power to levy a tax for its payment, or the discharge of the obligation, accompanies it; and this, too, without any special mention that such power is granted. This arises from the fact that such corporations seldom possess—so seldom, indeed, as to be exceptional—any means to discharge their pecuniary obligations, except by taxation. 'It is, therefore, to be inferred,' as observed by this court, in *Loan Association v. Topeka*, 20 Wall. 660, 'that when the legislature of a state authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation, which repels such an

inference." His honor then cited *Commonwealth v. Commissioners of Allegheny County*, 37 Pa. St. 277; *Lowell v. Boston*, 111 Mass. 460; *Hasbrouck v. Milwaukee*, 24 Wis. 122; and *Ex parte Parsons*, Hughes, 282, and continued: "Indeed, it is always to be assumed, in the absence of clear, restrictive provisions, that when the legislature grants to a city the power to create a debt, it intends that the city shall pay it, and that the payment shall not be left to its caprice or pleasure. When, therefore, a power to contract a debt is conferred, it must be held that a corresponding power of providing for its payment is also conferred. The latter is implied in the grant of the former, and such implication can not be overcome, except by express words including it. * * * Having the power to levy a tax for the payment of the judgments of the relator, it was the duty of the city, through its authorities, to exercise the power. The payment was not a matter resting in its pleasure, but a duty which it owed to the creditor. Having neglected this duty, the case was one in which a mandamus should have been issued to enforce its performance: *Knox County v. Aspinwall*, 24 How. 376; *Von Hoffman v. City of Quincy*, 4 Wall. 435; *Benbow v. Iowa City*, 7 Id. 313; *Supervisors v. Rogers*, Id. 175; *Supervisors v. Durant*, 9 Id. 415; *County of Cass v. Johnston*, 95 U. S. 360." Asserting the same doctrine is *United States v. City of Elizabeth*, U. S. C. C. for New Jersey, *The Reporter*, 232.

In these instances, where the writ of mandamus has been allowed to enforce the levy and collection of a tax, it is observable that such levy and collection were a duty which the body owing it neglected to perform; that the writ merely enforced the performance of this duty; that it operated simply upon the ministerial functions of the organization, in no wise affecting its right to use its discretion; as, upon such matter, it had no discretion.

COLE'S WIDOW v. HIS EXECUTORS.

[7 MARTIN N. S. 41.]

WHERE THE END IS CONCEDED the means of arriving at it are granted.
A WIFE MAY CLAIM ACQUESTS AND GAINS made in this state, although she was married abroad and never came in it.

APPEAL from the court of probate of the parish and city of New Orleans. The opinion states the case.

Smith and Workman, for the plaintiff.

Preston and Strawbridge, contra.

By Court, PORTER, J. The widow of the testator claims from the executors the one half of the property, real and personal, of which he died possessed, on the ground that it was acquests and gains made during coverture. The executors resist the action on two grounds: 1. That the court of probates had no jurisdiction of the case; and 2. That the plaintiff has no legal right to any portion of the property acquired during marriage.

The testator was married to the plaintiff in the state of New York, in the year 1810. He was then about twenty-four years

of age and she sixty-three. After the marriage they lived some time together, when the husband came to New Orleans. After a year's residence here he returned to New York, and there remained with his wife for the space of three years; at the expiration of which time he again removed to New Orleans, where he resided until his death, in 1827, and where he acquired the property which is the subject of the present contest. The plaintiff remained in New York, and never was in this state. The deceased made a will by which he bequeathed to a brother, living in Ireland, nearly the whole of the property of which he died possessed.

The first question relates to the jurisdiction of the court of probates, and we think the judge below did not err in taking cognizance of the case. That court having exclusive jurisdiction of the settlement of all claims against an estate represented by an executor and its liquidation and final settlement, it follows that it is before that tribunal a claim must be made, the rejection or admission of which is necessary to enable the succession to be closed. The other construction supposes the court not clothed with sufficient powers to carry its undoubted jurisdiction into effect. It sometimes, indeed, happens that tribunals are so defectively organized that one is compelled to act as the assistant of the other; but it requires a very clear expression of legislative will to authorize such a conclusion, the general rule being that where the end is conceded, the means of arriving at it are granted.

The next and more important question relates to the right of the wife in the acquets and gains. In the case of *Saul v. His Creditor* [16 Am. Dec. 212], which lately underwent so much discussion in this court, principles were established which greatly facilitate the investigation of the rights of the parties now before us. It is true in that case husband and wife had both resided in this state; and in the present instance, the husband alone lived in Louisiana. But we then determined that the law, or, to adopt the language of the jurisprudence of the continent of Europe, the statute which regulated the rights of husband and wife, was real, not personal, that it regulated things and subjected them to the laws of the country within which they were found. It follows, then, as a consequence, that property within the limits of this state must, on the dissolution of the marriage, be distributed according to the laws of Louisiana, no matter where the parties reside; because, viewing the statute as real, it is the thing on which it operates that gives it application, not

the residence of the person who may profit by the rule it contains: *Quando verba consuetudinis, vel statuti, disponunt circa rem, tunc de bonis judicandum est secundum consuetudinem loci, ubi res sunt situate; quia consuetudo afficit res ipsas, sive possideantur a cive, sive a forensi*: Greg. Lopez. Gloss. 2, Par. 4, tit. 11, 1; 24 Matienso, lib. 5, tit. 9, b. 2, gl. 1, n. 25. This doctrine has not, indeed, been much contested in the argument; and both parties seemed to concede that the case must be governed by our law. But the counsel for the appellants have contended that even by it the claim of the wife can not be maintained. Their principal grounds of objection are: 1. The positive legislation of the state; and 2. The separation of the husband and wife during the whole time the property was acquired.

The law of the *fuero real*, so often quoted in this court, declares that "everything which the husband and wife acquire while together shall be equally divided between them." It is urged this law does not provide for such a case as is now before the court; and that if it did, it is repealed by the two thousand three hundred and seventieth article of the Louisiana code, which declares that a marriage contracted out of the state, between persons who afterwards come to live here, is also subjected to the community of acquests and gains with respect to such property as is acquired after their arrival. The phraseology here used, it is said, indicates clearly the intention to exclude such a case as this. The statute refers to persons coming to reside here, not to one individual; it speaks not of his or her, but of their arrival.

The effect which the provisions in the late amendments to our code have in repealing former laws, depends on the general disposition contained in them, which declares what influence shall be given to them in this respect; and to their operation according to the general rules of construction.

The case of the appellants can receive no support on the first ground. It is provided by the three thousand five hundred and twenty-first article of the Louisiana code, that the former laws of the country are repealed in every case for which it has been specially provided in this code; and they shall not be invoked as laws, even under the pretense that their provisions are not contrary or repugnant to those of this code. Now the case of one of the married couple moving into this state, is not specially provided for; the former law, therefore, in relation to it is not repealed by this general provision. Whether, on the general rules of construction, the article already cited can be considered as abrogating a former law which, although different,

is not contrary, little need be now said. The vast quantity of positive legislation which has been given to the people of Louisiana, since the change of government, has called the attention of our courts repeatedly to this subject, and the principles which forbid such a conclusion have been again and again stated by this tribunal. The remarks, however, made in the case of *Saul v. His Creditors*, showing that provisions in the old code which gave a community of acquests and gains in marriages contracted within this state, did not repeal a former law which gave them in marriages contracted out of the state, when the parties afterwards removed into Louisiana, are so perfectly applicable to the instance before us that we refer to them to show why a provision in relation to husband and wife, coming to reside in this country, can not affect rules in relation to the removal of one of them.

The law of the *fuero real*, it is true, does not speak of one of the spouses coming into the country, nor does it provide for the case where both live under another government at the dissolution of the marriage; but it is a necessary consequence of the statute being real, that the property acquired within the limits of the state, and found there on the marriage being dissolved, should be governed by its provisions, no matter where the parties reside.

Whether the separation, and the failure of the wife to contribute her portion of care and industry to the acquisition, will defeat her right, is the next question to be examined. And finding on this head nothing in the law, its commentators, nor, in our judgment, in the reason of the thing, which makes the living apart in different states a greater objection than a separation would be in the country where the statute was in force, we shall examine what effect different residences would have if both had lived within the state of Louisiana.

On the argument, counsel went at some length into the principles on which the community of acquests and gains was established; and taking for the basis of such a rule the care and industry of both the spouses, they drew the conclusion that when it was established in evidence that one of them had not, or could not have, assisted in the acquisitions, the one so failing to contribute could not rightfully claim any portion of them.

The doctrine of the community of acquests and gains was unknown to the Roman law; and, although now common, we believe to the greater number of the European nations its origin can not be satisfactorily traced. The best opinion appears to

be that it took its rise with the Germans, among whom, at a very early period of their history, the wife took, by positive law, the one third of all the gains made during coverture. It is very probable that it was the real or presumed care and industry of the wife which first produced this legislation; and in an early state of society, the facts most probably fully justified such a rule. But in this, as in many other instances, legislation survives long after the causes which occasioned it have ceased to exist, and the non-existence of these causes will not authorize courts of justice to refuse giving effect to the law. There are few, we believe, who think, at the present stage of society, that the wife contributes equally with the husband to the acquisition of property. If such cases exist they are exceptions to the general rule. And yet, in this state, neither idleness, wasteful habits, normal nor physical incapacity would deprive the wife of an equal share in the acquests and gains; for our code declares that every marriage in Louisiana superinduces, of right, partnership, or community, in all acquisitions. Such also was the rule in Spain: La. Code, 2369; Merlin's rep. verbo communauté, vol. 2, p. 548; Febrero, p. 2, lib. 1, cap. 4, p. 1, n. 3.

The writers who treat on this subject make no such exceptions as are here contended for. On the contrary, they state that the residence of the parties in different places will not prevent the community from existing. In Spain, indeed, if the wife never went to cohabit with her husband, the community did not commence: *sin haber ida cohabitar con su marido*, is the case put by Febrero, in the passage relied on by the appellant's counsel. As in the ancient customs of France, it began, not from the day of the marriage, but from its consummation. The separation spoken of by the same author is a legal one. It required the judgment of an ecclesiastical court, and although such jurisdiction is unknown to us, still a judicial sentence is necessary to destroy the community. It was so in France; it is so under our code. The law wisely refuses any legal effect to a voluntary separation of those who are bound by the most solemn of obligations to live together: Pothier, traité de com., par. 1, n. 22; Id. par. 3, n. 494; Febrero, par. 2, lib. 1, cap. 4, nos. 1, 2, 46, and 50.

On the particular circumstances of the case on which so much has been said at the bar, few remarks are required from the court. The match most probably originated (as such connections generally do, where there is so great a disparity of age)

in cupidity on the one side, and folly on the other. He who sacrifices to avarice, has the less cause of complaint if the bargain turns out a hard one. The separation most probably was voluntary. The husband, at least, could not (if living) have urged it was not, for if he had desired his wife to live with him, it was his duty to have required her to do so.

We can not take into our consideration the property in New York. Our statute is real, and where the parties are not married here, can only act on the property found in Louisiana. That which is in our sister state will follow its laws.

It is, therefore, ordered, adjudged and decreed, that the judgment of the probate court be affirmed, with costs.

THOMPSON v. CHAUVEAU.

[7 MARTIN, N. S. 331.]

AN EXECUTION TO BE LEVIED ON GOODS and chattels, does not authorize the seizure and sale of real estate.

EVIDENCE ADMISSIBLE AGAINST AN AGENT, is also admissible against the principal who comes into court to support the act of the agent.

WHERE A PURCHASER AT A SHERIFF'S SALE INTERVENES to maintain its validity, the court may order him to restore possession.

APPEAL from the court of the parish and city of New Orleans. The opinion states the case.

Nixon, for the plaintiff.

Canon and McCaleb, for the defendant.

By Court, PORTER, J. The defendant, who is city marshal, seized, under execution against Grymes and wife, a lot which the petitioner had acquired by authentic act, and of which he was in possession. The plaintiffs in execution have appeared in the action, and alleged various grounds why the sale to the plaintiff was null and void, as it respects creditors.

We are strongly inclined to think that none of these grounds are sustainable, in the situation the parties now present themselves. The plaintiffs were not authorized, perhaps, to treat the alienation as void, and seize the property in the hands of a third party. They ought to have brought an action to have had it set aside. But supposing they were authorized to proceed in the manner they did, we are clear the language of the execution did not authorize the seizure of real estate, and the marshal is responsible.

The writ issued by the justice of the peace, directed him to seize the goods and chattels of the defendants in execution. Neither in the technical understanding of these words as used in our law, nor in the ordinary meaning given to them by common use, and the authority of the best philologists, can they be considered as embracing real estate. The act of 1805, which gives the form of the writ of *fieri facias*, uses the expressions, "goods and chattels, lands and tenements." If the terms goods and chattels, comprehend lands and tenements, the latter words were useless, and placed there for no purpose. This, of course, we can not presume in an act of the legislature. More particularly when in the French text of the law, which at that time was of equal authority with the English, we find "goods and chattels," rendered by *effets, meubles*. Johnson, in his dictionary, states goods to mean personal property; chattels any movable possession. The popular understanding of these words, it is unnecessary for us to remark, is in conformity with these definitions.

Several bills of exceptions were taken in the trial, to the introduction on the part of the plaintiff, of proceedings had by him against the defendant, Chauveau, before the justice of the peace. They were objected to on the ground that they were irrelevant, and not evidence against the plaintiffs in execution, who had appeared in this cause to support the proceedings of the marshal. They were not, perhaps, necessary to enable the plaintiff to maintain this action, but not being able to perceive any injury they could have done to the defendants, we do not think the cause should have been remanded on that account. As to their being *res inter alios acta*, and therefore not evidence against the intervenors, we are of opinion there is no weight in the objection. Parties who voluntarily appear in court to vindicate and justify the acts of their agent, can not, in any respect, deprive those who complain of those acts, of the use of any evidence which could have been legally offered against him.

The appellee has complained of the judgment of the court below, in not directing one of the intervenors in the suit, who purchased the property at sheriff's sale, to give up possession of the premises, and the complaint, we think, well founded. The purchaser having declared that the acts of the marshal were done by his authority, and joined issue on the validity of his proceedings, of which the sale to himself made a part, the decree of the court would not reach the merits of the case, if he were not compelled to restore the possession.

It is, therefore, ordered, adjudged and decreed, that the judg-

ment of the parish court be annulled, avoided, and reversed, and it is further ordered, adjudged, and decreed, that the plaintiff do recover possession of the lot in question from H. Buckman, or of the intervenors in this cause; that he also recover from the defendant, Louis Chauveau, the sum of one hundred and fifty dollars, with costs in both courts; and that the said Louis Chauveau do recover from Norman, McCleod & Campbell, Henry Buckman, George Singleton, G. R. Baumgard, and Hiram Houghton, the said sum of one hundred and fifty dollars, with costs in both courts.

WALKER v. DUNBAR.

[7 MARTIN, N. S. 586.]

AN INTERVENOR CAN NOT RETARD the trial of a cause in which he interpleads.

APPEAL from the court of the third district. The opinion states the case.

Peirce, for defendant.

By Court, PORTER, J. This is an hypothecary action. The defendant pleaded that he was only a tenant at the time of the institution of the suit, and that he had given it up to another possessor. He further averred that the house of Dicks, Booker & Co., were the owners of the property, and he prayed that they might be cited in warranty to defend the suit. This answer was filed on the twelfth of May, 1828.

The application to cite Dicks, Booker & Co. in warranty was opposed, and it is stated in the record that after argument the court took time to advise. No decision appears to have been made on it; but at the following term these parties appeared, prayed leave to file their claims in intervention, and were allowed to do so. In the answer, as it is called in this record, which the interpleaders filed, they required their vendors to be cited in warranty; and they afterwards moved that the cause might be continued to enable them to have their warrantors cited. The court overruled the application, and it is assigned as error that the judge erred in doing so.

The appellants rely on the 380th, 381st, 382d, and 383d articles of the code of practice, which confer the right on a party sued to have a continuance to enable him to cite in his warrantor.

The appellee contends that the appellants were not called in as warrantors; that they can not be considered as defendants; that they voluntarily intervened in the suit; and that by the three hundred and ninety-first article of the code of practice, intervenors can not retard the trial of the suit in which they interplead.

We think as the appellants voluntarily appeared in the cause as intervenors, and not in pursuance of a citation in warranty, they must take all the responsibility which the law attaches to the character in which they thought proper to present themselves, and that the court below did not err in refusing them permission to continue the case.

It is, therefore, adjudged and decreed that the judgment of the district court be affirmed, with costs.

INTERVENTION: See the note to *Brown v. Saul*, 16 Am. Dec. 177; *Olamageras v. Bucks*, 16 Id. 186; *Lacroix v. Menard*, 15 Id. 161, and note.

CASES
IN THE
COURT OF APPEALS
OF
MARYLAND.

RINGGOLD v. RINGGOLD.

[1 HARRIS AND GILL, 11.]

TRUSTEES AUTHORIZED TO SELL REAL ESTATE and invest the proceeds in stock, are not thereby empowered to exchange the trust property for other real property.

CONTRACTS BETWEEN CESTUI QUE TRUSTS AND THEIR TRUSTEES, although not void, are strictly scrutinized by courts of equity in order that no injustice may be done the *cestui que trusts*, and before the same will be upheld, it must appear that the latter were free to act as rational, intelligent men.

TRUSTEES WHO VIOLATE THEIR TRUST in a sale of the trust property, are liable to the *cestui que trusts* for the utmost value of the property sold, but where the actual value can be clearly ascertained, that is the measure of indemnity.

SALE OF THE TRUST PROPERTY, by one trustee to his co trustee, is a breach of the trust, for which both are liable.

TRUST, WHEN IMPLIED.—Where two persons sold personal property belonging to another, with his assent, and took bonds from the purchasers in their own name, and collected a portion of the purchase-money, a court of equity will infer some conventional arrangement between the parties, in the nature of a trust, which it will enforce.

COURTS OF EQUITY WILL NEVER GO beyond the allegations in the bill in decreeing relief.

TRUSTEES LIABLE FOR EACH OTHER'S ACTS.—Co-trustees are bound to watch over the conduct of each other, and to know of the collection of funds belonging to the trust estate; and if one of two trustees fails to apply money collected by him, from a sale of the trust fund, to certain outstanding indebtedness, and the other trustee knows of the receipt of such money, and makes no effort to have the same so applied, the latter is jointly chargeable for interest, with his associate.

IDEM—WHEN CHARGEABLE WITH INTEREST.—If, in the management of the trust fund, the trustees exceed their power, or make unproductive invest-

ments, they are chargeable with interest; and if they apply the same to their own use, they are chargeable with compound interest.

TRUSTEES ARE CHARGEABLE WITH COMPOUND INTEREST on the ground of the presumed gain to them, from the use of the trust fund, and, if the circumstances are such as to forbid such presumption, and it appears that they invested the trust fund in good faith, although in violation of their trust, and that they have not derived any profit from such investment, they will not be charged with compound interest.

RESTS OF SIX MONTHS ALLOWED TRUSTEES without interest, to re-invest the same, are not unreasonable.

ALLEGATIONS IN AN ANSWER responsive to the bill are evidence for the defendant, but averments of new matter, in avoidance, are not.

ENGLISH RULE IS, THAT TRUSTEES are not entitled to any compensation for their services, but the English courts allow them a certain *per diem*, under the name of an indemnity.

TRUSTEES IN MARYLAND are allowed the same compensation for their services, as are allowed to executors, etc., by statute.

A DECREE BEING REFORMED IN THE APPELLATE COURT, on cross appeals, each party was decreed to pay his own costs.

Cross appeals from the court of chancery.

Original bill filed January 29, 1811, by Mary Ringgold, wife of Thomas Ringgold, and the children of Mary and Thomas, by their next friend, James Gittings, against Samuel and Tench Ringgold for an accounting and settlement, by the defendants, as trustees of said Thomas. In October, 1798, Thomas authorized the defendants to collect a large amount of debts due him, and also conveyed to them a large amount of real estate to take charge of, sell the same, and to pay his debts, the balance to be invested for his benefit during his life, and upon his death one third of the property undisposed of to go to his wife in lieu of dower, the balance to be subject to his testamentary disposition. Mary was not a party to this deed. In December, 1807, Thomas executed a second deed of trust to the defendants, conveying to them a large amount of real and personal estate, and authorized them to sell the same and invest the proceeds in bank, government, or turnpike stock, and apply the proceeds as follows: 1. one-fifth of the interest to his wife; 2. one-half the residue to his children for their support and education; 3. the residue to himself; 4. all that remained of the trust property, upon the death of Thomas, was to go to his wife and children. The wife, Mary, joined in this deed and thereby released her dower. Defendants, as trustees, exchanged a farm called "Hopewell" with one R. S. Thomas for certain land owned by him, and then sold the land received by them for fourteen thousand dollars, being less than the value of the "Hopewell"

farm. This exchange was ratified by the trustor, Thomas Ringgold. It appeared that the trust fund had been mixed by the trustees with their own property, and that Tench received a large sum of money from sales of trust property and allowed the same to remain uninvested, which was known to his co-trustee. Subsequent to the filing of the original bill Thomas died and a supplemental bill was filed, bringing his representatives before the court. The answers of defendants contained several credits for money expended, of which there was no proof except the answers. The further facts appear from the opinion. Both parties appeal.

Wirt, Att'y-Gen. of U. S., *Jones*, *Taney*, and *Magruder*, for the trustees. 1. It is no breach of trust if the trustees act with the *cestui que trust*, or he acquiesces: *Langford v. Gascoyne*, 11 Ves. 333, 335; *Parkes v. White*, Id. 225; *Brice v. Stokes*, 11 Id. 324. The exchange with R. S. Thomas cannot be impeached in this suit, because he is not a party: *Murray v. Ballou*, 1 Johns. Ch. 575; *Selby v. Alston*, 3 Ves. 341. 2. One trustee is not liable for the conduct of the other: *Brice v. Stokes*, 11 Ves. 319; *Hovey v. Blakeman*, 4 Id. 606; *Bacon v. Bacon*, 5 Id. 331; *Chambers v. Minchin*, 7 Id. 199. 3. The trustees in this case were not chargeable with interest: *Tew v. Earl of Winterton*, 1 Ves. Jr. 450, 451; *Bruere v. Pemberton*, 12 Ves. 385; *Langford v. Gascoyne*, 11 Id. 333. 4. In England a *per diem* is allowed to trustees for their trouble, but this is not the rule here. The practice in the chancery courts of this state is to allow a certain sum by way of commission. 5. The matter in avoidance of, as well as the matter responsive to the bill, was evidence for the defendants, if the matter in avoidance was matter strictly connected with the matter responsive: *Hart v. Ten Eyck*, 2 Johns. Ch. 52; *Blount v. Burrows*, 4 Bro. Ch. 75; S. C., 1 Ves. Jr. 546; *Doyle v. Blake*, 2 Sch. & Lef. 243; *Green v. Hart*, 1 Johns. 580. 6. The defendants were not chargeable with compound interest: *Perkins v. Baynton*, 1 Bro. Ch. R. 375; *Treves v. Tumbshend*, Id. 384; *Piety v. Stace*, 4 Ves. 620; *Ashburnham v. Thompson*, 13 Id. 402; *Crackel v. Bethune*, 1 Jac. & W. 566.

Berrien, *Hoffman*, and *Mayer*, for the complainants. 1. A trustee can not, even without *mala fide*, invest in a fund not sanctioned by a court of equity. The trustees had no power to exchange the "Hopewell" farm for other property, and they are liable for the full value of the same: *Hancon v. Allen*, 2 Dick. 498; *Terry v. Terry*, Prec. in Chan. 273; *Mason v. Day*,

Id. 319; *Lupton v. White*, 15 Ves. 439, 440; *Earl Poulet v. Herbert*, 1 Id. 296; *Forrest v. Elives*, 4 Id. 491; *Pocock v. Reddington*, 5 Id. 794; *Hart v. Ten Eyck*, 2 Johns. Ch. 62, 116, 117. The trustees are not entitled to any benefit from the sanction or approbation of Thomas Ringgold, of the exchange of the "Hopewell" farm: 1 Pothier on Oblig. 29, 30; *Gibson v. Geyes*, 6 Ves. 226; *Huguenin v. Baseley*, 14 Id. 273; *Villars v. Beaumont*, 1 Vern. 100; *Green v. Winter*, 1 Johns. Ch. 35, 36 [7 Am. Dec. 475]; 2. Trustees are jointly as well as severally responsible for all moneys and property received by them, or either of them. No case can be found which exempts a trustee merely because he received no portion of the wasted estate: *Churchill v. Hobson*, 1 Salk. 318; *Tounley v. Calenor*, Cro. Car. 312; *Westley v. Clarke*, 1 Eden, 356; *Boardman v. Mosman*, 1 Bro. Ch. 68; *Sadler v. Hobbs*, 2 Id. 116; *Scurfield v. Howes*, 3 Id. 90; *Keeble v. Thompson*, Id. 112; *Monell v. Monell*, 5 Johns. Ch. 283 [9 Am. Dec. 298]; *Munford v. Murray*, 6 Johns. Ch. 1, 452; 11 Johns. 21; 3. The complainants admit the general rule, that an answer is *per se* proof, but that rule has no application to this case: *Hart v. Ten Eyck*, 2 Johns. Ch. 88, 89; 2 Poth. on Obl. 155 to 158, and note; *Scurfield v. Howes*, 3 Bro. Ch. R. 90, 95; *Pollard v. Lyman*, 1 Day, 165 [2 Am. Dec. 63]; 4. Interest is chargeable on all receipts from their dates, as the trustees never invested and never intended to invest the same: *Parrot v. Treby*, Prec. in Ch. 254; *Newton v. Bennett*, 1 Bro. Ch. R. 375; *Dawson v. Massey*, 1 Ball & Beatty, 219; *Tebbs v. Carpenter*, 1 Madd. Ch. R. 290; *Ratclif v. Graves*, 1 Vern. 196. Compound interest is as moral and legal a claim as simple interest, wherever interest upon interest has been made or might have been made. As between debtor and creditor, interest upon interest is rarely allowed, but still compound interest is recognized in certain cases as a right the same as simple interest: *Waring v. Cunliffe*, 1 Ves. jun. 99, and note; *Schieffelin v. Stewart*, 1 Johns. Ch. 624 to 629 [7 Am. Dec. 507]; *Dornford v. Dornford*, 12 Ves. 127; *Nightingale v. Lawson*, 1 Bro. Ch. R. 440, 443; 5. The settled and unvarying doctrine of the common law is, that private trustees who have not stipulated for a compensation, act gratuitously, and that no compensation or reward can be decreed to them: *How v. Godfrey*, Finch, 361; *Bonithon v. Hockmore*, 1 Vern. 316; *Char. Corp. v. Sutton*, 2 Atk. 406; *Green v. Winter*, 1 Johns. Ch. 27, 38, 43 [7 Am. Dec. 475]; *Munford v. Murray*, 6 Johns. Ch. 1, 17; *Manning v. Manning*, 1 Id. 527; *Mason v. Roosevelt*, 5 Id. 534, 540.

By Court, ARCHER, J. This cause is one of great magnitude

and interest; of magnitude in relation to the amount involved in its determination, and of interest not only on account of the principles connected with its decision, but of the peculiar relations in which the parties concerned stand to each other. On the one side, the complainants are the widow and children of one whose infirmities and dissipated habits were, early in life, involving in ruin and entanglement a large patrimonial estate, and who gave sure indications that, in a short time, he would reduce to poverty his wife and family. On the other hand, the respondents are the uncles of the complainants, who, observing the unfortunate habits of their brother, generously stepped in between him and his tottering fortune, and took upon themselves the onerous duties of trustees of his estate. After a period of twenty-four years they are presenting to this tribunal an account of their stewardship, which has been demanded by the widow and children of their brother.

After a laborious discussion of the very eminent counsel concerned for the parties, we have approached the examination of the multifarious and perplexed transactions which have grown out of a trust of such duration with an anxious solicitude to arrive at truth, and by applying the law to ascertained facts to reach the justice of the case. Courts have very frequently painful duties to perform, and although they can not be blind to the consequences which may flow to individuals from their decrees, yet insensibility to them is a stern mandate of judicial duty.

We do not deem it necessary for the purpose of this decree to recapitulate the proceedings and numerous facts in the record; they will, perhaps, be found to be sufficiently stated in the auditor's report, and in the chancellor's decree. The cross appeals will, for the purpose of this opinion, be considered as consolidated; and we shall proceed to present our views of the various questions which have been raised in the discussion by the counsel on either side. The court conceive that the trustees are accountable for the value of Hopewell. In the view which we take of this subject, so far at least as concerns this question, it is immaterial to inquire whether the transfer of this estate was made under the deed of 1798, or of 1807; for, in either view, they were not authorized to transfer that estate except by a sale. If it were considered as coming under the provisions of the deed of December, 1807, its terms are too explicit to need illustration. As it regards the deed of 1798, they were authorized to sell the whole or a part of the real estate on credit, or

for cash, and the surplus, whether consisting of real estate, bonds, or money, was to be applied as is therein directed. It has been contended that the trustees under this deed had authority to make the exchange of Hopewell for the ferry property on the Susquehanna, because the deed contemplates a surplus of land remaining on hand after the objects of the deed are gratified. The trustees might, in their discretion, only sell a part of the real estate, and the part in that event remaining in their hands would have been a surplus over and above what was necessary to effectuate the objects of the trust. The argument would have been entitled to more weight had the direction been to sell the whole estate. The sale of Hopewell was not only a violation of the express stipulations of the trust, but was known and acknowledged to be so by the respondents. The deed for the ferries, from Richard S. Thomas, was given to them in their individual characters, and not as trustees; and the reason for this procedure, as is deducible from the complainant's exhibit B, is, that they had no right, by the terms of the trust, to take the ferries in exchange. In this transaction they both co-operated, and although they may have acted with the best intentions, and with the most honorable views towards their *cestui que trusts*, this court must hold them jointly responsible, unless by the various acts of sanction which have been given by Thomas Ringgold, they shall appear to have been justified. Apprehending, indeed, responsibility growing out of this transaction, the trustees, if they did not seek indemnity for this contract, accepted a bond from Thomas Ringgold reciting his original assent to the exchange, and binding himself to save them harmless; and on the same day on which the bond was executed, as if the more surely to guard them from anticipated responsibility, he made his last will and testament, in which, as far as he could, he attempted a ratification of this transaction. This instrument, although its expressions are general, has an undoubted allusion to this contract alone, for no other sales of real estate are alleged to have been made, which needed ratification. These instruments were executed nearly four years after the execution of the deed of December, 1807, by which he transferred all his land, negroes, stock, and farming utensils to the trustees. His habits of inebriety are represented by the testimony before us, to have been confirmed and to have greatly debased and debilitated his mind. He was either placed, or believed himself to be placed, in a condition of the most abject dependence on his brothers, for even the

most common necessities of life. He had clear and unquestionable rights, as one of the *cestui que trusts* under the different deeds of trust, which secured to him, in all probability, an ample independence. Yet, instead of manifesting any desire to enforce those rights, as his necessities might require, his letters rather represent him in the condition of a penniless dependent on their charity and bounty. The relation existing between a trustee and *cestui que trust*, the policy of the law requires, should be guarded with vigilance by a court of equity; contracts between them should be scrutinized, that no injustice should be done the *cestui que trusts*. It is true, these various acts of attempted indemnity do not, in relation to the transactions to which they have reference, or from their character as manifested on the face of them, bear any striking evidence of legal inefficiency. It might not have been inconsistent with those great principles of moral duty, or just liberality, which one brother might owe to another, to grant indemnity for acts, which, though injurious in their consequences, he might have believed proceeded from the purest motives. But a court of equity ought to be perfectly satisfied that he was free to act as a rational, intelligent man, that he was not governed by considerations growing out of a dependent condition; and in this case there is too much reason to believe, not only from his letters, but from his general character and conduct, as detailed by the testimony, that the considerations above alluded to entered largely into the motives for executing these instruments.

The responsibility of the respondents, growing out of this contract, having been determined, it is necessary to ascertain the price with which they should be charged. The *cestui que trusts* are entitled upon every principle of equity to the full value of the lands at the time of the sale. The trust has been violated, the title to the lands disposed of contrary to the express injunction of the instrument under which they act, and there is no possible means by which this court can reinstate the complainants in their interest but by charging the trustees with the utmost value of the property. This is the principle adopted in the case of a mixture or confusion of property, and the ground of it is that although the trustee may be injured by its application, yet the *cestui que trusts* are certain of indemnity; and it would be but just that if, in the impossibility growing out of the conduct of the trustee of ascertaining the actual value, injury should probably result, it should rather fall on him whose conduct had been delinquent than on the innocent

cestui que trusts. Yet, where the value of the property can be clearly ascertained, that must be the measure of indemnity. But for the circumstances which preceded and followed this sale, we should have been compelled to fix the value of these lands from the opinions and recollections of witnesses of the state and condition of the property, and what it would have sold for in 1807, and for this purpose the depositions of Mr. Thomas, Mr. Worrell and Mr. Barroll, would have been sufficient; but the record furnishes us with the evidence that these lands were advertised for sale, that the sale was attended by many persons of property; that the lands were examined by several who were considered as desirous of purchasing, and who were able to have become purchasers; yet, that when it was set up, a greater price could not be obtained than sixteen dollars per acre, and that the trustees bought it in for the estate at that sum, and afterwards actually agreed to sell it to R. S. Thomas for that price, and even he refused to execute his contract. These facts furnish the best evidence that the lands did not exceed the value of sixteen dollars, and greatly outweigh the opinions of witnesses as to its value, given many years after it was thus publicly offered. If the land had been more valuable, it would surely have been bid for at a greater sum when it was thus offered under such favorable circumstances. Nothing can be deduced of the value of Hopewell from the price which was fixed on it in the deed from the trustees to R. S. Thomas; this was done in consideration of the exchange. Thomas, whose experience made him better acquainted with the ferries, was anxious to dispose of them, and probably anticipated some of the losses and inconveniences which subsequently attended them; although he was unwilling to give sixteen dollars an acre for Hopewell in cash, yet, if the ferries were taken in part, he was willing to give a much greater sum. This only shows his anxiety to rid himself of the ferries, and not that Hopewell was, even in his estimation, worth more. The court, therefore, think the chancellor erred in charging the value of Hopewell and Chester town property at twenty-five thousand dollars.

The amount due from Tench Ringgold for the sale of the three hundred and thirty-two and one half acres of the Washington lands has been also one of the subjects of controversy. It has been contended by the respondents that these lands were sold by Thomas Ringgold before the execution of the deed of trust of October 22, 1798, and that having been so sold, they

were not conveyed, or intended to be transferred by that instrument, and were not a part of the trust property, and this is emphatically stated in the answers of the respondents; and in the letters of General Ringgold to Mr. Brice, exhibited by the complainants, he regrets it as a misfortune that the lands were sold by Thomas before the deed of trust was thought of; and it is said that one of the complainants, James G. Ringgold, acting for himself, and as agent and solicitor for the other complainants, has admitted the fact. But whatever may be the strength of this testimony, it is not warranted by the exhibits and evidence in the cause. By exhibit S. R. No. 1, Samuel Ringgold charges himself, as trustee, with the receipt of part of the purchase-money of these lands; this account constitutes a part of the answer, as much so as any express averment in it; and in Tench Ringgold's exhibit, which also constitutes a part of his answer, it is said that on the twenty-first of November, 1798, a settlement took place between Tench and Thomas, and assented to by Samuel, by which it appears that Thomas Ringgold is charged with the legacy due Tench, with interest, up to the sixth of March, 1799, which shows that until that period the legacy was unsatisfied, as it could not have been if a sale had taken place before the deed of trust. These inferences and facts are strongly supported, too, by the evidence furnished by the deed of October, 1798, itself; that declares on its face the indebtedness of Thomas to Tench, and one of the first objects of the trust then created is the satisfaction of the legacies due from Thomas under his father's will (the legacy to Tench being one), by the sale of the lands. This instrument does, therefore, entirely negative the idea that a sale of these lands was made before the execution of that deed. But if Thomas had agreed to sell the lands to Tench, the legal estate in the Washington lands, with the amount due thereon, passed to the trustees, and it was unquestionably the duty of Samuel to collect the purchase-money, and convey the property. The deed of the twenty-seventh of May, 1799, from Thomas and Mary Ringgold to Samuel and Tench Ringgold, instead of impugning the idea of a sale by the trustees, is calculated to confirm it. If the Washington lands were not trust property, and did not pass by the deed of 1798, why was this deed executed to Tench and Samuel? Would he not have been more likely to have himself coerced the payment from Tench, and conveyed it to him, had he personally sold it to Tench, and retained the title?

Instead of this, he joins his wife in a conveyance to Samuel and Tench, which is in entire inconsistency with the idea of a previous sale by him. The object of this deed was undoubtedly to pass to the trustees the dower of Mrs. Ringgold, that Samuel might be enabled to give an unincumbered title to Tench, when the purchase-money should have been paid by him to Samuel. In any light in which this transaction can be viewed, a joint responsibility grows out of it. If the estate passed by the deed of 1798, there was a breach of trust in Samuel in selling to his co-trustee, which would make him responsible, and if contracted for by Thomas with Tench, before the execution of that instrument, it still passed the legal estate to the trustees, and it was Samuel's duty to have collected it; and having not only failed to do so, but having made no effort for this purpose at any period of the existence of the trust, but suffered it to lie in his hands when he knew the trust was abused, in consequence of a failure on Tench's part to apply the amount of this purchase-money to the payment of the debts of Thomas Ringgold, he has clearly made himself responsible equally with his co-trustee.

The joint responsibility of the respondents for the sale of the property in November, 1807, on the eastern shore, is a question which has also been submitted to the consideration of the court. The bill charges the trusts under the deeds of 1798 and 1807, and the answer of the defendants admit the trusts confided to them; and in their various exhibits, which are made parts of their answers, they return accounts of their sales of the personal property as made under these deeds. It seems to have been considered by the trustees, as far as the evidence in the cause will enable this court to judge, that the trustees conceived they had power, under the deed of 1807, to sell the personal property which was disposed of by them, from Huntingfield and Hopewell. But it is very clear that a deed made on the eighteenth of December, 1807, could confer no right to property which they had sold on the twenty-seventh of November preceding. Thomas Ringgold at that period had no interest to convey. Samuel and Tench had sold it all previously to various purchasers in his presence, or with his express approbation, at a time, too, when he had, for aught that appears in the cause, a complete right to it; for by the deed of 1798 no personal property was conveyed, and we can not notice the deed of January, 1807, as it is not evidence in any manner in this cause. It is very probable that these sales were all made in anticipation of the deed

of December, 1807, which was to follow, and did follow in a few days after the sales. That Samuel and Tench were trustees of this property, must be inferred from all the evidence. They exercised dominion over it; they sold it with the assent of Thomas; they took bonds from the purchasers in their own names; they collected a part of the purchase-money, and they have proffered themselves ready to account for these sales, and have made a return thereof as having been made by them as trustees. These sales not being then within either deed of trust, must have been made under some conventional arrangement, either verbal or written, which is not before the court, and which is only to be inferred from the transactions of the parties. That such a trust may be asserted and enforced in a court of equity can not be questioned. But the difficulty on the part of the complainants, arises from the circumstance that there is no allegation in the bill which covers or affects other trusts than those of October, 1798, and of December, 1807. A court can not be aided in the construction of any agreement by the acts which the parties may have done under it, nor is a party bound by any construction which he may have put upon the instrument. The answer, therefore, which presents a list of the negroes and specific articles of personal property sold on the eastern shore, also discloses the fact that the sales were made anterior to its execution, and the evidence confirms the answer in this respect. Had these sales been actually made in anticipation of the deed of 1807, and resting on the agreement of the parties that they should be confirmed by that instrument, and that their responsibility for the proceeds of these sales should be governed by its stipulations, which we have no doubt from the evidence was the fact; had some verbal or other trust existed under which they were made, or had Samuel exercised dominion over the property after the execution of the deed of January, 1807, and proceeded to sell the property as trustee, in virtue of its stipulation, as if it had been a valid and operative transfer, and had under these circumstances joined Tench with him as agent, or associated him as a co-trustee with the assent of the parties, in anticipation of a deed of trust subsequently to be executed, it was surely important that each or all of these facts, as the truth might warrant, should have formed substantive allegations in the bill; or if either fraud or mistake had given the deed of December, 1807, the shape which it now assumes, contrary to the understanding and agreement of the parties, that should also have been averred. A court of equity

must always decree upon the allegations of the complainants. It is never justified in going beyond them. Such a course would violate the fundamental principles of pleading, and would work a surprise on the respondents.

Had the respondents admitted a sale under these deeds, without disclosing the fact of the anterior sales, it might be well questioned whether what had been thus in pleading explicitly admitted, could be contradicted by the adduction of evidence on their part, showing that the sales were anterior to the deed; but having averred the sales previous to the deed, although they state that the sales have been made by them as trustees, they are not estopped and precluded from demanding whether a legal responsibility grows out of the deeds of trust for sales previously made by any just construction thereof. We are, therefore, of opinion that in this cause, whatever under other circumstances might be the right of the complainant's demands against the respondents as trustees for sales of the personal property on the eastern shore, this court, in the state of these proceedings, can not decree against them for the amount of those sales. In this respect, the rights of the parties are reserved for the future consideration of a court of equity, should the complainants deem that their interest demands an investigation.

But although the sales of the personal property can not be covered by any allegations in the bill, this court, in this proceeding, will do equity between the parties as far as is consistent with the established principles of chancery proceedings. It appears from the evidence in the cause as furnished by the answers of the defendants (see their various accounts filed as exhibits to their answers), that Samuel Ringgold has received the sum of one thousand one hundred and seventeen dollars and eighty-three cents, part of these sales, and that Tench Ringgold has received the residue from the different purchasers. Samuel Ringgold has applied the sum thus received to debts of the estate, and Tench Ringgold has paid debts and made disbursements to a considerable amount, after the sales of the personal property. We shall, therefore, consider, so far as Tench has, after the sales of the personal property, paid debts and made disbursements for the estate of Thomas, that they were made from such receipts; for all the residue of Tench's receipts, which will be unexhausted by such an application, and for the amount of his own purchases at the sales of 1807, all of which remains uncollected, accountability must be sought by the complainants in a new proceeding. We conceive from the evidence

in the cause, that although these sales were not within the terms of the trust of 1807, charged in the bill, yet they were in their hands as trustees for the payment of debts, as well as the property actually passing by that conveyance, and being so, and their accounts showing generally that debts were paid, without designating out of what trust fund particularly they were paid, that for the purpose of effectuating justice between the parties, we have a right to consider that the debts and disbursements after the sales of 1807, were paid by each trustee to the amount of actual receipts by each, from these sales, out of the money received by them from such sources.

We consider the respondents as properly chargeable for the amount received from Thomas Ringgold's securities. These securities, amounting to the sum of eight thousand one hundred and ninety-one dollars and forty-seven cents, were received in the years 1799, 1800, 1801, 1803 and 1805, as appears by the accounts exhibited and receipts offered in evidence. The complainants alleged, that at the time of the execution of the deed of trust of 1798, authority was given by Thomas Ringgold to the respondents, to collect all debts due to him, to be applied to the payment of his debts, and that in virtue of such authority, large sums of money were received by them, and they pray an account thereof. This allegation is not directly answered, otherwise than by their exhibited accounts, and by testimony, from which it appears that outstanding debts, at that time due to a large amount, were by them collected as trustees. These facts justify us in saying that such authority was given, and that they acted in regard to them as joint trustees.

These respondents are also chargeable with the rents received for the lands of Thomas Ringgold. The legal estate passed in these estates to the trustees by the deed of 1798. They were rented out, and the rents received should have been applied to the purposes of the trust.

The subject of interest forms a very important item in the controversies between the parties, the respondents insisting that interest ought not to be charged against them, while the complainants contend that they should be allowed compound interest, or if not, that the chancellor has erred in allowing a rest of six months from the receipt of moneys by the trustees free of interest.

As it regards the balance due from Tench for the Washington lands, there can be no pretense for exemption from interest; he was to pay for them at a stipulated period, and has failed to do

so, and it having been determined that there is a joint responsibility for the principal, there is, of course, a joint responsibility for the interest.

As it regards the receipts of Tench between the execution of the two deeds of trust, which were not applied by him to the payment of debts, it may be remarked that it was his duty to apply them to such outstanding claims as were then due from the *cestui que trusts*, or if he had detained them to have met the outstanding judgment of J. J. Maund, to have placed those moneys in a situation where they could never have met with those accidents, to which every individual's fortune may be liable. He should, at least, have shown us that the funds were kept separated from the mass of his estate. Could this have been done, this court would have been disposed to show the utmost indulgence. The pressing character of the outstanding debts could not but be known during this period of Samuel, for he was, during the most of this time, advancing from his private estate to meet them; yet he makes no effort to obtain the funds in Tench's hand to be applied to these objects. He must have known that Tench had funds; for he was permitted to collect debts on the eastern shore, and if he did not know, he was surely bound to know and to watch over the conduct of his co-trustee. Upon such sums they must be conjointly charged with interest.

For the amount due from them on account of the Hopewell estate, they are certainly chargeable with interest. That they invested it in property unproductive, can furnish no ground for exemption, because they acknowledgedly transcended their power, and violated their legal duties and obligations. We must consider them as having the value of this estate in hand at the sale; and the reason assigned for the previous liability, will apply to them in this particular, if the sales were even made under the deed of 1798, where the obligations of the trustees to pay interest are not so entirely clear and apparent as under the deed of 1807. But the sale may and ought to be considered as made under the latter deed. It is true, the contract of sale was made before, but they derived their power and authority to perfect it under the deed of 1807; for that conferred the power to pass it free from the incumbrance of Mary Ringgold's dower; and the title of R. S. Thomas was in fact made and perfected after and under that instrument, the conveyance to R. S. Thomas having been made in 1808. Now, what are the stipulations of the deed of December, 1807, so far as they relate to the present question? "That the whole estate

thereby conveyed should be immediately sold, and after paying all the just debts of Thomas Ringgold, the proceeds should, as received, be invested in government, bank, or turnpike stock, and the interest or dividends to be paid in the proportions therein mentioned; part to Mrs. Ringgold, during the joint lives of herself and Thomas; part to Thomas, during his life; and part to be applied to the support and education of the children of Thomas and Mary, yearly and half-yearly, as the same may be received; and that until the proceeds of the sale shall be invested in stock, the interest arising therefrom shall be paid and applied when and as it is received, in the proportions therein designated, to the *cestui que trusts*." Having the proceeds of this estate in hand, it was their imperative duty to have invested, unless a portion, or the whole of them, had been demanded by acknowledged debts of Thomas Ringgold. The deed was intended as a family provision, and the debts then outstanding, except Maund's judgment, were inconsiderable. By transferring the legal estate to the trustees in all this property, they placed their dependence upon its productiveness in their hands for a support. They parted with the income which it furnished, in consideration, and evidently under the expectation, that it would be immediately invested. It had been represented, nearly a year prior, by one of the trustees, that the estate was nearly disincumbered of debts, and hopes were entertained that Maund's claim, which was then depending in court, would be perpetually enjoined. It had been litigated, at that period, for several years, and no reasonable expectation could then be entertained that it would be very speedily brought to a close. Under these circumstances, would the trustees have been justified in laying by the money, and patiently waiting for the event of a protracted chancery suit; the debt daily growing larger by accumulating interest, the funds remaining idle and stationary, and the family suffering for want of the means of subsistence, depending on the charity of their relatives? It never could have been the intention of the parties, that the investment in stocks should await the determination of J. J. Maund's judgment, or that the family should for a moment be left without support; for the interest on the sales is directed to be paid them until the funds are invested; thus looking to a constantly accruing interest, and negating every idea of any intended permission that they should lie idle for such a purpose. Had the money then remained in their hands, they would have been grossly negligent in not investing it. In such a case,

the rule is settled that trustees are chargeable with interest: *Treves v. Tumbshend*, 1 Brown's Ch. R. 384; *Rock v. Hart*, 11 Ves. 58; and the rule, Chancellor Kent declares to be founded in justice and good policy, as tending both to prevent abuse and indemnify against negligence: *Duncomb v. Duncomb*, 1 Johns. Ch. 504, 508 [7 Am. Dec. 504].

Where the trustee is directed to invest funds and to re-invest the dividends or interest, or, in other words, where the trust directs an accumulation, and the trustee has used the funds, compound interest will be allowed, as was done in the case of *Raphael v. Boehm*, 11 Ves. 92, 108, 109; and S. C., 13 Ves. 407, 590; or where he has used the trust-money, or employed it in his trade or business, he shall also be charged in the same manner as was decreed in *Schieffelin v. Stewart and others*, 1 Johns. Ch. 620 [7 Am. Dec. 507]. The grounds of this allowance, as is apparent from these cases, is founded on the gain, or presumed gain, of the trustees, and that the *cestui que trust* may be indemnified by the efforts of the court in this way to reach their profits, or presumed profits. But, in this case, although the *cestui que trusts* could not, perhaps, be indemnified by a less allowance than compound interest, yet the circumstances forbid the presumption of a gain on the part of the trustees; although the investment was in violation of the trust, it was done, doubtlessly, with the best intentions; with no views whatever of reaping from the transaction any benefit to themselves, but declaring that the profits, whatever they might be, if any, should be for the benefit of the trust estate. Believing such to have been their motives and views, public policy forbids that courts of justice should pursue a course which would have a tendency to deter persons from accepting offices frequently so necessary for mankind.

The trustees have been allowed, on the authority of the case of *Duncomb v. Duncomb*, 1 Johns. Ch. 510 [7 Am. Dec. 504], a rest of six months without interest on their receipts. This is allowed as a reasonable time within which to pay or invest the funds. There would be great reason in the rule had they actually invested or made efforts to invest; but in this case no dispositions were ever manifested to make such an application of the money as the trust contemplated. Debts due from the estate were in many instances accumulating interest with the addition of costs, while funds were suffered to lie idle in the hands of one of the trustees, or were diverted to objects of ex-

penditure foreign to the trust. To allow this rest, would, in our opinion, be doing injustice to the *cestui que trusts*.

Part of the account of Simon Wilmer, together with many other charges against the estate, were allowed by the auditor in his accounts, and sanctioned by the chancellor's decree, for which no vouchers were produced, and these allowances have been made the respondents, from the statement in their answers alone, by which they represent these disbursements to have been made. The general rule, that an answer responsive to a bill, is evidence for a respondent, is a well-established and settled principle. But, the answer of a defendant, where it asserts a right affirmatively in opposition to the plaintiff's demand, is not evidence: *Beckwith v. Buller*, 1 Wash. 224; *Paynes v. Coles*, 1 Munf. 373. An answer will not support a matter set up in avoidance or discharge where the matter of avoidance is a distinct fact. In such case the defense must be proved. Mr. Evans, in his appendix to Pothier on Obligations, 157, lays down the following principle: That where the answer is replied to, the whole is put in issue, and the defendant must support by proof all the facts upon which he means to insist, while the complainant may rely upon every fact admitted which he conceives to be material, without being bound to the admission of others; and this rule he deduces from a case cited in Gilbert, 51, which, as it is a leading case, it will be necessary to notice. There, the defendant, by his answer, which was put in issue by the complainant's replication, admitted, as executor, that the testator had left one thousand one hundred pounds, and said that afterwards the testator gave a bond for one thousand pounds, and the testator gave him the other one hundred pounds; as there was no evidence but the defendant's admission for the receipt, it was contended that he ought to find credit when he swears to his own discharge; but it was resolved by the court, that when an answer was put in issue, what was confessed and admitted need not be proved, but that it behooved the defendant to make out, by proof, what was insisted upon by way of avoidance. Chancellor Kent declares that this rule is well settled in chancery proceedings, and recognizes and adopts it in the case of *Hart v. Ten Eyck*, 2 Johns. Ch. 62, where all the learning on this subject is ably collected and reviewed, and where it was determined that on a bill to account, the answer is no evidence of disbursements. The cases above cited, from Washington and Munford's Reports, were also bills in chancery against executors to account, and where discharges alleged in the answers were

held to be of no avail unless supported by proof. The doctrine may then be considered as settled, that on a general bill to account, the answer is no evidence of disbursements, notwithstanding it is said that the court of errors of the state of New York overruled on appeal the judgment of Chancellor Kent on this question: 7 Johns. Ch., General Index, tit. Evidence, 75, pl. 11. That tribunal, from its peculiar structure, does not appear to be calculated for legal investigation, and its judgments can not outweigh the opinion of Chancellor Kent, fortified as it is by numerous cases of established authority. But it is said, there being a call here for the amount of disbursements and debts paid, that this case is varied from those which have been cited. It is true, there is, from aught that appears, a variance in form, but there is none in substance. For a prayer that the defendant shall account, is in effect a call on the defendant to state in his answer, not only his receipts but his disbursements, so that the complainants may have an opportunity of putting them in issue; and without which, indeed, the defendant himself could give no evidence of them. Nothing more is demanded in the interrogatories in this bill, than under a general call to account, the defendant would have been obliged to answer. It is nothing more, in either case, than a demand on the defendant to show his receipts and the legal evidences of their payments, and to say that the respondents should have done it is demanding from them nothing extraordinary or out of the usual course of human transactions.

The establishment of a contrary doctrine would lead to dangerous consequences, and would be calculated to render trusts valueless, by giving to trustees, executors, and guardians, the power, on their own oaths, to exempt themselves from all responsibility. The rule, then, may be stated (and it is the good sense of all the cases cited in the argument), that in all cases where a complainant seeks a discovery and relief, and, to make out his case, applies himself to the conscience of the defendant, if, in his answer, the liability is once admitted, there can be no escape from it but by proof. It is true, everything which he says, with regard to the creation of that liability, must be taken together; detached sentences can not be used against him, but everything which he says relative to his original liability, is properly in evidence. This doctrine will be found to be supported in *Lady Ormond v. Hutchinson*, 13 Ves. 53, 54, and by the cases above referred to.

The complainants, by their supplemental bill, seek to make

the respondents accountable for nine negroes, taken by Samuel Ringgold, at the stipulated price of two thousand dollars. The answer of Samuel admits that they were so taken, but denies accountability, as they were taken at a valuation, in part payment of large sums of money, paid and advanced by the respondent, to Thomas Ringgold, and that a balance is still due him of upwards of three thousand five hundred dollars. Samuel Ringgold, in Exhibit No. 1, filed with his answer to the original bill, has charged Thomas Ringgold with the payment to D. and W. McMechen, of the sum of three thousand five hundred and seventy-four dollars.

The court are of opinion that the respondents cannot be charged with the valuation of these negroes. It is in evidence that Thomas Ringgold admitted that they were taken in part satisfaction of a debt, due from him to Samuel, in the year 1806; at a time when, from aught that appears in evidence, he was exercising dominion over his personal estate, and when no deed of trust, which the court in this cause can notice, covered it. As it regards the sum of three thousand five hundred and seventy-four dollars, which Samuel Ringgold claims credit for, the court deem it unnecessary, in pronouncing their judgment, to recapitulate the testimony of the various witnesses who have been examined on the subject. Nor do they deem it necessary to determine the question as to the competency of Tench Ringgold's testimony, for it is considered that there is enough in the record without it, to justify the allowance.

It is contended that this court is not competent to allow commissions, as a compensation to the trustees for their trouble. In England a liberal indemnity is allowed to trustees for their expenses, but nothing as a compensation, unless founded in positive agreement between the parties. This rule appears to be applicable, not only to trustees of every description, but to executors. They are considered as confidential offices, gratuitously undertaken from motives of friendship or humanity, and without views of personal benefit or profit. Yet the English courts grant *per diem* allowances, not in the nature of a compensation, but under the name of an indemnity. The difference then, in truth, is only in the mode of allowance, not in the principle. It is, in fact, a mere difference in name. Commissions in a case like this might very fairly be considered as only extending a just and reasonable indemnity for time bestowed in the management of the concerns of others. But if, indeed, there was a difference in principle, this court would feel themselves

justified in granting reasonable commissions. Our statutes allow commissions to executors, administrators, guardians, and trustees under judicial sales, and by analogy to these statutes, or by an equitable construction of them, the allowance may, and ought to, be made in this case. But although the general claim to commissions is admissible, we conceive that none should be allowed for the sale of Prospect Hill. The trustees have paid N. Brice, their agent, the only commissions to which they were entitled on this sale.

By the will of Mary Ringgold, bearing date in October, 1803, certain legacies were bequeathed to Samuel and Tench Ringgold, in trust for Thomas Ringgold; with these legacies the respondents have charged themselves in their account accompanying their answers, but have, at the same time, referred to the source from which they emanate. There is no allegation in the bill of complaint or supplemental bill which reaches this trust, and they cannot in this proceeding be charged with them, either jointly or severally, but the equity of the complainants, in respect thereof, is reserved.

The court have appointed an auditor for the purpose of stating an account between the parties, upon the principles contained in this opinion, and will direct that his costs shall be taxed in this proceeding. From the account thus audited, it appears that the sum of thirty-nine thousand three hundred and eighteen dollars and fifty-four cents, with interest on the sum of twenty-eight thousand five hundred and seventy-six dollars and eighty-seven cents, part thereof, from the first of July, 1822, is due from the respondents to the complainants, which will be decreed to be paid into the court of chancery, to be distributed or invested under the authority thereof, according to the rights of the respective complainants.

We concur with the chancellor in awarding costs to the complainants, and are of the opinion, as the decree of that court will be entirely reformed, that each party pay their own costs in this court.

Decreed, that the decree of the court of chancery, given and rendered in these causes, be reversed, except as to the amount and sum of money, hereby decreed to be payable to the appellees in the first and the appellants in the second of these causes. And this court proceeding to pronounce such decree in the premises as the court of chancery ought to have pronounced: Decreed, also, that there is due from the appellants in the first and appellees in the second of these causes, and

that they do pay to the appellees in the first and appellants in the second of these causes, in the manner hereinafter mentioned, the sum of thirty-nine thousand three hundred and eighteen dollars and fifty-four cents, with interest on the sum of twenty-eight thousand five hundred and seventy-six dollars and eighty-seven cents, part thereof, from the first day of July, 1822, the said sum, with interest, having been ascertained by and agreeably to the accounts hereto annexed.

Decreed, also, that the parties in the said causes pay their respective costs incurred by them in this court, on their appeals, but that the appellants in the first and appellees in the second of these causes pay to the appellees in the first and the appellants in the second thereof the costs incurred by the said appellees in the first and the appellants in the second of said causes, in the court of chancery.

Decreed, also, that the chancellor make and pass all necessary orders for carrying this decree into full and complete effect, by ordering and directing that the said sum of money, with interest as aforesaid, and the costs as aforesaid, incurred in the court of chancery, be brought into the said court of chancery, by the appellants in the first and appellees in the second of these causes, to be distributed and paid under the directions of the chancellor to the said appellees in the first and appellants in the second of said causes, according to their respective rights and interests; and, also, that the chancellor order and direct that the said appellees in the first and appellants in the second of said causes, pay to the auditor of the court of chancery the sum of twenty-three dollars and thirty-three cents, allowed by this court to the auditor, for his fees in auditing and stating the accounts directed by this court to be made between the parties.

Decreed also, that all the equity and equitable rights and claims of the said appellees in the first and appellants in the second of said causes, be, and the same is hereby reserved and maintained to them, against the said Samuel Ringgold and Tench Ringgold, or either of them as to all or any personal estate, of the late Thomas Ringgold, or the proceeds of sales or dispositions thereof, of any kind, and interest on such proceeds, except as to so much of such personal estate and proceeds, as has by the accounts hereto annexed, and by this decree, been applied to or in reference to the payments and disbursements, by the said Samuel and Tench, or either of them; and, also, that the like equity be reserved and maintained to the said appellees in the first and appellants in the second of said causes, against

the said Samuel Ringgold and Tench Ringgold, or each or either of them, as to any legacies bequeathed to or for the benefit of the said Thomas Ringgold, by the last will and testament of his mother, Mary Ringgold.

Decree reversed, etc.

BUCHANAN, C. J., dissented.

TRUSTEE CAN NOT purchase at his own sale, either in person or by another, and if such a purchase is made it is fraudulent, and will be set aside upon application to the court: *Dorsey v. Dorsey*, 6 Am. Dec. 506; *Singstack v. Harding*, 7 Id. 667; *Davis v. Simpson*, 9 Id. 500.

TRUSTEES, WHEN CHARGEABLE WITH COMPOUND INTEREST.—For an exhaustive dissertation upon this question, see note to *Selleck v. French*, 6 Am. Dec. 196, 197. The general rule seems to be, that compound interest is not allowed except in certain cases: *Breckenridge v. Brooks*, 12 Id. 408, note.

COMPENSATION OF TRUSTEES.—The rule laid down and followed in the principal case is the one generally adopted in the United States. The English and American authorities, on this question, are examined at length in the note to *Gibson's case*, 17 Am. Dec. 266.

McCULLOH v. DASHIELL'S ADMINISTRATOR.

[1 HARRIS & GILL, 90.]

PARTNERSHIP CREDITORS IN EQUITY, CAN ONLY LOOK to the surplus of their debtor's separate estate after the payment of his separate debts.

SEPARATE CREDITORS IN EQUITY CAN ONLY APPLY the surplus of a joint fund to the satisfaction of their debts, after the claims of the joint creditors have been discharged.

JOINT CREDITORS MAY, AT LAW, PURSUE both the joint and separate estate, to the extent of each, for the satisfaction of their joint demands, which are at law considered both joint and several.

COURTS OF EQUITY DO NOT, AS AGAINST SEPARATE CREDITORS, treat a joint debt, as joint and several, yet where the claims of joint creditors do not come into conflict with the separate creditors, but only with the interests of the representatives of a deceased partner, equity will, as against such representatives, decree to joint creditors a satisfaction of their claims, by considering them joint and several.

APPEAL from the Somerset county court, sitting as a court of equity. The complainant claimed to be paid out of the assets in the defendant's hand an equal proportion of their claims with the other creditors of Dashiell. This was refused, and a decree entered that no part of complainant's claim should be paid, except from the partnership fund, until the separate and individual debts of Dashiell were paid. Complainant appealed. The other facts appear from the opinion.

J. Bayly, for appellant. The complainant was entitled to be paid an equal proportion of his claim with the separate creditors of Dashiell out of the assets in the hands of the defendant: Acts of 1798, c. 101, sub. c. 8, secs. 5, 7, 10, 16, 17; and 1805, c. 110, sec. 7; *Murray v. Ridley's Adm'str*, 3 Harr. and McH. 175; *Hamersley v. Lambert*, 2 Johns. Ch. 508; *Tucker v. Oxl-y*, 5 Cranch, 34, 39; *Ex parte Elton*, 3 Ves. 238; *Murray v. Murray*, 5 Johns. 60; *Ex parte Hodgson*, 2 Bro. Ch. R. 5; *Harrison v. Sterry*, 5 Cranch, 302.

R. N. Martin and Tingle, contra. Individual creditors are entitled to have their debts satisfied out of their debtor's separate estate in preference to partnership creditors. The interest that partnership creditors have is after the payment of individual debts: 2 Madd. Ch. 463. Partnership effects shall, in the first place be applied to pay partnership debts. The separate creditors can only resort to the surplus: 1 Madd. Ch. 463; 2 Id. 466; *Ex parte Crowder*, 2 Vern. 706; *Ex parte Hunter*, 1 Atk. 227; *Ex parte Cook*, 2 P. Wms. 500; *Ex parte Elton*, 3 Ves. 238; *Ex parte Clarke*, 4 Id. 677; *Ex parte Abell*, Id. 837, 839; *Thomas v. Fraser*, 3 Id. 399, note; *Ex parte Clay*, 6 Id. 813; *Ex parte Reeve*, 9 Id. 590; Gow on Partnership, 270, 271, 272, 317, 367, 461; 1 Bac. Abr., tit. Bankruptcy.

By Court, *ARCHER, J.* The bill filed in this cause states that a bill of exchange was, on the eighteenth of August, 1817, drawn by the firm of Chase & Tilyard upon Dashiell and Bennett, co-partners in trade, for the sum of seven hundred dollars, in favor of the complainant, and that it was by the drawees duly accepted; that a suit was instituted against Dashiell and Bennett upon the said acceptance by the complainant; that, pending the action in Somerset county court, the intestate of the defendant, and one of the firm of Dashiell & Bennett, died, and the judgment was obtained against Bennett, the surviving partner. That Bennett applied for and obtained the benefit of the insolvent laws of this state, having been finally discharged at November term, 1820, no part of the claim having been paid; that the said surviving partner had no property, either joint or separate, where-with satisfaction could be made of the said debt. That Parsons, the respondent, took out letters of administration on the estate of Dashiell; and prays that a decree may pass directing the administrator to pay the amount of the acceptance from the assets of the deceased, or such part thereof as, upon a just distribution of the assets, he may, as one of his creditors, be entitled to.

The bill of exchange above referred to, the judgment, and certificate of the final discharge of Bennett are filed as exhibits in the cause; and the following admission of counsel is contained in the record: "That the trustee of Richard Bennett, an insolvent debtor, has not received any property belonging to Bennett; that no part of the debt due to the complainant has been paid either by the trustee or by Bennett; that the personal estate of Dashiell is insufficient to pay his private and individual creditors; that the defendant has received of the partnership debts due to the firm of Bennett and Dashiell, thirty-five dollars and ninety-three cents. The parties, moreover, admit the exhibits above stated as testimony, and waive the formality of making either the trustee or Bennett, the surviving partner, a party to these proceedings."

The question presented for the decision of this court upon this record is, whether the complainant is entitled to be paid an equal proportion of his claim, with the separate creditors of Dashiell, out of the assets in the defendant's hands, or whether the claim, being a joint claim, shall be postponed until all the separate creditors shall be first fully paid?

The question thus stated is one of considerable importance, and although, undoubtedly, of very frequent occurrence in the subordinate testamentary tribunals, has never, we believe, received an adjudication in the appellate court or in any of the higher courts of original jurisdiction.

There are very few cases in the English books bearing directly upon the distribution of assets in a case situated as this is. It has been contended in argument that it must be governed by the principles adopted in England in the marshaling of assets in bankruptcy. And as they are distributed according to equity, if the rule can be definitely ascertained, it ought to govern here. But an examination of the authorities will show that it has been very unsteady and fluctuating, varying frequently in form, often in substance, according to the ideas entertained by each succeeding chancellor of the rights of the joint and separate creditors, and moulded more upon their notions of convenience to all the parties concerned than as standing upon legal reasoning: *Dutton v. Morrison*, 17 Ves. 205. Amid the multitude of decisions which have taken place upon this subject, it is no easy task to trace the history of the rule of distribution in bankruptcy.

But this examination will satisfy us that amidst all the fluctuations of the rule, the principles established in the first cases,

occurring more than a century since, have but for a short period been materially encroached upon, and that now the leading principles of distribution, with some modifications, are what they were originally established to be.

In *Ex parte Crowder*, 2 Vern. 706, decided in 1715, which was an application on the part of the separate creditors to be let in under a joint commission, the separate estate being of small value, it was decided that they might be permitted to prove their claims under the joint commission, but that the joint funds were applicable, in the first instance, to the payment of joint debts, and then the separate debts; and that the separate effects should be applied to the payment of the separate debts, and that the surplus should go to the liquidation of the joint debts. In *Ex parte Cook*, 2 P. Wms. 500 (in 1728), Lord Chancellor King followed the determination in *Ex parte Crowder*, and declared it to be settled, and that it was a resolution of convenience, that the joint creditors shall be first paid out of the partnership estate, and the separate creditors out of the separate estate, of each partner, and if there be a surplus of the joint estate, besides what will pay the joint creditors, the same shall be applied to pay the separate creditors; and if there be, on the other hand, a surplus of the separate estate, beyond what will pay the separate creditors, it shall go to supply any deficiency that may remain as to the joint creditors. In *Ex parte Hunter*, 1 Atk. 228 (in 1742), Lord Hardwicke says, as between joint and separate creditors, the joint estate shall be applied to the joint creditors, and the separate estate to the separate creditors. The rule that prevailed during the administrations of Lords King and Hardwicke, from 1715 down to the time of Lord Thurlow, was that joint creditors could not prove under a separate commission for the purpose of receiving dividends with the separate creditors: *Watson on Part.* 244; *Ex parte Thitt*, 16 Ves. 195; but only for the purpose of going for the surplus after the satisfaction of the separate creditors.

But Lord Thurlow broke in upon the established practice of the court, which had prevailed for sixty years, and in 1785, in *Ex parte Hodgson*, 2 Bro. Ch. R. 5, resolved that there was no distinction between joint and separate creditors; that they ought to be paid out of the bankrupt's estate, and his moiety of the joint estate; and that the joint creditors ought to come in *pari passu* with the separate creditors. This resolution, laid down as it is in broad and general terms, would appear to have broken down all the boundaries previously established between

the rights and priorities of the joint and separate creditors; yet if taken with the limitations with which it is said by Watson on Partnerships to have been qualified, it will appear to have made this innovation only that they should all, joint as well as separate creditors, be permitted to prove their claims against the separate estate upon a separate commission; but that it was competent for the assignees to confine the joint creditors, where there was a joint estate, to that fund exclusively, by filing a bill in equity against the other partners, and obtaining an injunction upon the order in bankruptcy. And that this was the consequence of Lord Thurlow's adjudication is apparent from Lord Rosslyn's judgment in *Ex parte Elton*, 3 Ves. 238. Thus the rights of the joint and separate creditors, on their respective funds where there was a joint estate, were maintained, notwithstanding the alterations thus made in the order in bankruptcy.

In the case of *Ex parte Elton*, decided in 1796, the rule established in 1785 was deemed by the then chancellor to be an inconvenient one, because every order which he passed in bankruptcy, that the joint creditor should receive a dividend out of the separate estate, might give rise to a bill in equity on the part of the separate creditors to restrain this order and to secure the appropriation of the separate estate to the satisfaction of the separate debts; and it was adjudged that a joint creditor might prove his claim under a separate commission, not for the purpose of receiving a dividend, until an account should be taken of what he had or might have received from the partnership effects.

Thus the chancellor, in the modification which he gave to the order in bankruptcy, exercised his equity jurisdiction and gave to each order the operation of an injunction, without the expense of a bill, whereby the joint creditor was restrained from coming on the separate fund until, in the final adjustment of the co-partnership and individual accounts, equity should determine what portion of the separate funds should be allotted to the joint creditor. And he says that the joint creditors are in the situation of a person having two funds. The court will not allow him to attach himself to one fund to the prejudice of those who have no other, and to neglect the other fund. He has the law open to him, but if he comes to claim a distribution, the first consideration is, what is that fund from which he seeks it? It is the separate estate which is particularly attached to the separate creditors. Upon the supposition there is a joint estate, the answer is, Apply yourself to that, you have

a right to come upon it. The separate creditors have not. Therefore, do not affect the fund attached to them till you have obtained what you can get from the joint fund.

Thus it would appear that the ancient order of distribution was restored with this modification, that the joint creditors might prove, but could not, as before, receive dividends without further order of the chancellor, which should be made after the settlement of accounts, which were directed to be kept, as before, separate. This important principle also seems distinctly to be set up by this decision, that where there are no joint effects, and no solvent partner, the joint creditors might be permitted to come in with the separate creditors, a doctrine which appears to have been first recognized by Lord Thurlow, in *Ex parte Hayden*, 1 Bro. Ch. R. 454, for before that period it has been seen that they could only come upon the surplus. This doctrine Lord Eldon has uniformly adhered to, although it will be found that he repeatedly complains of it, as a rule producing some inconveniences, and liable to several objections, as will be seen by a reference to *Ex parte Pinkerton*, 6 Ves. 815, note; *Ex parte Kensington*, 14 Id. 447; *Ex parte Kendall*, 17 Id. 521; *Ex parte Abell*, 4 Id. 837. In the case of *Ex parte Kensington*, the joint were forbid receiving dividends with the separate creditors, on the ground that there was one solvent partner, although there was no joint estate. That the petitioner would have been allowed had the partner been bankrupt, is the necessary inference from the case; and in the former case the joint creditors were permitted to come in where there were no joint effects, upon the ground that the solvent partner was abroad, and that, therefore, the difficulty was increased in resorting to him.

Such is a succinct history of the law upon this subject, and the modern doctrine has been summarily stated by Eden, in his notes to *Ex parte Hodgson*, 2 Bro. Ch. 5; by Vesey, in *Ex parte Thill*, in his vol. 16, 194 n; and also by Maddock, in the second volume of his *Treatise on the Principles and Practice of the Court of Chancery*, 463. They all unite in saying (and they are fully supported by the authorities cited by them respectively in saying), "that the joint creditor may prove under a separate commission, for the purpose of assenting to, or dissenting from, the commission, or of going against the surplus after the satisfaction of the separate debts, not to vote on the choice of assignees, or receive dividends with the separate creditors (except a joint creditor who is a petitioning creditor under the com-

mission), or where there are no joint effects, or no solvent partner, or no separate debts, or the joint creditors will pay twenty shillings in the pound to the separate creditors."

The case of *Gray v. Chiswell*, 9 Ves. 124, as it is strongly illustrative of the above doctrines, and was a case, not in bankruptcy, but in equity, will be particularly adverted to. A bill was filed by the creditors of Cook against the heir and executrix of Chiswell, claiming to come upon the real estate of Chiswell for the amount of their debts, as the personal estate had been absorbed by specialty creditors. Chiswell had been a partner of Nantes; Nantes had survived him, and had become bankrupt. The joint creditors of Nantes and Chiswell proved their claims before the master. The joint estate was insolvent, being only able to pay an inconsiderable dividend, and the sum proposed to be raised by a sale or mortgage of Chiswell's real estate, was not more than sufficient to pay the separate creditors. A contest arose between the joint and separate creditors, the former insisting on their right to come in *pari passu* with the separate creditors, upon this fund, thus proposed to be raised out of his separate estate. But the chancellor, Lord Eldon, refused to permit them, upon the ground that in bankruptcy it could not be done, and that the accidental death of Chiswell ought not to put the joint creditors in a better situation than they would have been had he lived and become bankrupt. If there be any estate for distribution among the joint creditors, although the surviving partner is bankrupt, they are not, in bankruptcy, permitted to come in with the separate creditors. The chancellor, therefore, here, as in bankruptcy, would not permit the joint creditors, who had effectuated their claims under the commission against Nantes, although they had received but an inconsiderable dividend, to come in *pari passu* with the separate creditors. There was here some joint estate, and then the general rule applied that each species of creditor must be satisfied out of the fund to which his debt particularly attaches itself; and the rule has been carried to this extent that if there be a joint fund of any, even the smallest, description which is capable of being realized, the rule is inflexible, and the joint creditors will not be permitted to receive dividends from the separate estate: *Ex parte Peake*, Gow. on Part. 408. Thus we perceive from the case of *Gray v. Chiswell*, that the rule which is applied in bankruptcy is extended to cases in equity.

It is difficult to say upon what the rule in equity and in bankruptcy, with the modification above stated, is founded. The

joint estate is benefited to the extent of every credit which is given to the firm, and so is the separate estate in the same manner enlarged by the debts it may create with any individual, and there would be unquestionably a clear equity in confining the creditors to each estate respectively, which has thus been benefited by their transactions. So far the rule is sensible and intelligible; and although at law the joint creditors may pursue both the joint and separate estate to the extent of each for the satisfaction of their joint demands, which are at law considered both joint and several, without the possibility of the interposition of any restraining power of a court of equity; yet when, by the death of one of the parties, the legal right survives against the surviving partner, and is extinguished against the deceased partner, a court of equity will give to the separate creditors all the advantages thus by accident thrown upon them, and will not, by adopting the rigorous rule of the law merchant, thereby injure and prejudice the separate creditor, upon whom, viewed in connection with the separate fund, it always looks upon as meritorious, and entitled, in the distribution of assets, to the preference. But although a court of equity, as against the separate creditors, will not adopt the law merchant, which considers the contract both joint and several; yet whatever doubts have heretofore been entertained on the subject, where the claims of these joint creditors do not come into conflict with the separate creditors, but only with the interests of the representatives of the deceased partner, it is now undeniably settled that equity will, as against such representatives, decree to joint creditors a satisfaction of their claims by considering them as they are considered at law both joint and several.

But although these distinctions are built on the solid foundations of reason and justice, it is not altogether so easy to perceive, why, when there is no joint fund, and no solvent partner (by no solvent partner is meant bankrupt partner), the joint creditor should thereby acquire the equitable right of coming in with the separate creditors *pari passu*, upon a fund in no manner benefited by the creation of his debt. Such, however, is the settled and established rule as we are enabled to collect it both in bankruptcy and in equity; and according to this rule the complainant could not in this case be permitted to seek indemnity for his claim from the separate estate *pari passu* with separate creditors, as it is a conceded fact in the cause that there are joint funds, although very inconsiderable, and greatly insufficient to pay the debt of the complainant.

But were not this the fact, this court would have no difficulty in saying that the complainant should be postponed to the separate creditors, and that whether there was any joint estate or not, he should not be permitted to divide with the separate creditors a fund insufficient to pay them. We are, therefore, disposed to adopt the ancient rule as more consonant to equity and justice, that the joint creditors can only look to the surplus after the payment of the separate debts; and on the other hand, that the separate creditors can only seek indemnity from the surplus of the joint fund after the satisfaction of the joint creditors.

It is believed that the case of *Tucker v. Oxley*, 5 Cranch, 34, somewhat militates against the views which we have taken of the English law upon this subject, and it has been pressed upon this court by the appellant's counsel as containing principles decisive of this case. It was there determined that under the bankrupt law of the United States (and the bankrupt law of England and that of the United States, so far as connected with the matter there decided, are nearly identical), a joint debt may be set off against the separate claim of the assignee of one of the partners, but that such set-off could not be made at law, independent of the bankrupt system. The particular decision in this case it is not material perhaps to examine, because it was a case at law, and the relations of the parties were materially different. It would perhaps be sufficient to say that the supreme court, although they conceive a legal right exists in the joint creditors to prove and receive dividends out of the separate estate, explicitly admit that such right it is competent for a court of equity to restrain, and to compel the exercise of such right in such manner as not to prejudice or to do injustice to others. We might, in any view of the case before us, dismiss without further observation the case of *Tucker v. Oxley*, but we can not forbear remarking that the case upon which the court there build their opinion, that a legal right universally exists in the joint creditors upon a separate commission to come on the separate estate *pari passu* with the separate creditors, is the case where a joint creditor is the petitioning creditor, and is an excepted case from the general rule: *Vide* argument of Sir Samuel Romilly, in *Ex parte Ackerman*, 14 Ves. 604, and the authorities referred to by Vesey. Maddox, in his first volume, 463, considers this a singular exception to the general rule; and the reason assigned for the adoption of the exception is, that a joint creditor having petitioned for the commission of

bankruptcy, it might be considered in the nature of a modified execution taken out by him, as well for his own benefit as for that of the separate creditors; and that it would be against all equity to permit the separate creditors to prevent the joint creditor from reaping the fruits of an execution taken out for his and their mutual benefit.

Thus, without encroaching upon any decided case, and acting in strict conformity to the settled doctrines, it must be determined, that although Bennett is a certificated insolvent, yet as the separate estate of Dashiell is insufficient to pay his individual debts, the complainant, a joint creditor of Bennett and Dashiell, can not be permitted to come in *pari passu* with the separate creditors of Dashiell.

Decree affirmed.

PARTNERS' SEPARATE PROPERTY, WHEN LIABLE FOR PARTNERSHIP DEBTS.—ENGLISH RULE.—In *Dob v. Halsey*, 8 Am. Dec. 293, and the note thereto, page 297, the liability of the property of a partnership for the individual debt of a partner, was discussed at length. It is here proposed to examine briefly as to when the individual property of a partner may be applied to the satisfaction of partnership debts. In England, in 1715, the rule was established in equity that partnership creditors were entitled to be first satisfied from the partnership property; and that separate creditors of the individual partners from the separate estate of the partner with whom the contract had been entered into, or by whom the debt was incurred; and that the individual property of the partners could not be applied towards the satisfaction of partnership debts until the separate creditors of each partner had been paid: *Ex parte Crowder*, 2 Vern. 706; *Ex parte Cook*, 2 F. Wms. 500. In *Ex parte Hunter*, 1 Atk. 228, decided in 1742, Lord Hardwicke recognized and followed the rule stated. Such was the law of England until 1785, when an innovation was made upon this rule by Lord Thurlow in *Ex parte Hodgson*, 2 Bro. C. C. 5, where it was determined that there was no difference between the debts of joint and separate creditors, and the former were permitted to come in and receive dividends *pari passu*, with the latter, from the separate estate of the common debtor: *Ex parte Copland*, 1 Cox, 420; *Ex parte Page*, 2 Bro. C. C. 119; see *Dutton v. Morrison*, 17 Ves. 193, 207. The innovation thus made remained the law of England for a brief period, but on account of the inconvenience and supposed injustice resulting therefrom, the principle of the rule as first obtained was restored by Lord Loughborough, afterwards Earl Rosslyn, upon great consideration, in the case of *Ex parte Elton*, 3 Ves. 238. In that case the lord chancellor said: "The plain rule of distribution is, that each estate shall bear its own debts. The equity is so plain that it is of course upon a bill filed. The object of a commission is to distribute the effects with the least expense. Every order I make to prove a joint debt upon the separate estate must produce a bill in equity. It is not fundamentally a just distribution, nor a convenient distribution, because it tends to more litigation and more expense. Every creditor of the partnership would come upon the separate estate. The consequences would be, the assignees of the separate estate must file a bill to restrain the dividend upon all these proofs, and make the partners parties.

But there is another circumstance. It is a contrivance to throw this upon the separate estate; for what hinders them from recovering at law this debt against the partnership; for it is money paid to one of the partners. They have nothing to do but to bring an action against the partners. The affairs of the partnership may be very much involved; but if they are arrested, they would pay it. It is not stated as a case where there are no joint effects. Here it is only that there are two funds. Their proper fund is the joint estate, and they must get as much as they can from that first. There is this singularity attending this case, that the whole transaction between them and Fry is a partnership transaction. The money was paid to one of the partners; most probably for the use of the partnership; the bill was drawn and accepted in the name of the partnership. I have no difficulty in ordering them to be admitted to prove; but not to receive a dividend." So at page 241, he said: "Wherever my order will procure an account of the joint estate, there can be no harm; for then I should give the usual directions to apply the funds respectively, the joint estate to the joint debts, the separate to the separate debts; the surplus of each to come in reciprocally to the creditors remaining upon the other." And the rule as thus re-established by Lord Loughborough, has ever since been the law of England: *Ex parte Abell*, 4 Ves. 837; *Ex parte Clay*, 6 Id. 813; *Ex parte Chandler*, 9 Id. 35; *Ex parte Hall*, Id. 349; *Ex parte Alcock*, 11 Id. 603; *Ex parte Taitt*, 16 Id. 193; *Ex parte Delastet*, 17 Id. 247; *Lodge v. Prichard*, 1 De G. J. & Sm. 610; *Gray v. Chiswell*, 9 Ves. 118; *Addis v. Knight*, 2 Mer. 117; *Croft v. Pyke*, 3 P. Wm. 180; *Ex parte Kensington*, 14 Ves. 447; *Ridgway v. Clare*, 19 Beav. 111; *Lindley on Partnership*, vol. 2, pp. 1095, 1096; *Whittingstall v. Crover*, 10 W. R. 53; *Story on Partnership*, sec. 377. There seems to be one exception in England to the rule referred to, and that is, where one of the partners is deceased, and there is no joint estate whatever, and no solvent partner, joint creditors are admitted to share in the separate estate of the deceased, and to rank *pari passu* with the separate creditors therein: *Cowell v. Sikes*, 2 Russ. 191; *Lodge v. Prichard*, 1 De G. J. & Sm. 610; *Lindley on Partnership*, vol. 2, p. 1096.

IDEM—RULE IN THE UNITED STATES.—In the United States a remarkable difference of opinion exists upon the question now being considered. A large number of decisions emanating from some of the most able and respectable courts in the union are found adopting and following the prevailing English rule as recognized by Lord Hardwicke and Lord Loughborough. On the other hand, decisions of courts equally as able, and whose opinions are entitled to the most respectful consideration, are found denying that rule, adopting that laid down by Lord Thurlow, and allowing joint creditors to share the same as separate creditors in the separate estate of members of a co-partnership. The following will be found as some of the authorities approving the prevailing English rule, and deciding that in equity joint creditors of a partnership are not entitled to resort to the separate estate of the partners, until the separate creditors have been first paid therefrom: *Morrison v. Kuntz*, 15 Ill. 193; *Moline Manuf'g Co. v. Webster*, 26 Id. 233; *Adams v. Sturges*, 55 Id. 468; *Murrill v. Neill*, 8 How. (U. S.) 414; *Hall v. Hall*, 2 McCord's Ch. 269; *Glenn v. Gill*, 2 Md. 1; *Ridgely v. Carey*, 4 H. & McH. 167; *Egberts v. Wood*, 3 Paige, 518; *Payne v. Matthews*, 6 Id. 19; *Robb v. Stevens*, 1 Clarke, 192; *Black's Appeal*, 8 Wright, 503; *McCormick's Appeal*, 55 Pa. St. 252; *Ladd v. Griswold*, 4 Gilm. 25; *Rodgers v. Meranda*, 7 Ohio St. 179; *Smith v. Mallory*, 24 Ala. 628; *Bridge v. McCullough*, 27 Id. 661; *Murray v. Murray*, 5 Johns. Ch. 60; *Meech v. Allen*, 17 N. Y. 300; *Arnold*

v. *Harner*, 1 Freem. Ch. 509; *Weyer v. Thornburgh*, 15 Ind. 124; *Dean v. Phillips*, 17 Id. 406; *Oakey v. Casey*, 1 Freeman, 536; *Irby v. Graham*, 46 Miss. 425; *Story's Equity Jurisprudence*, vol. 1, sec. 675. The general doctrine prevalent in courts of equity, that where a creditor has two funds to which he may resort for payment, he must exhaust the one in which he has an exclusive interest, before he resorts to the fund to which another creditor can only resort, taken in connection with the fact that partnership debts are generally contracted exclusively on the credit of the partnership assets, and we have the reasons upon which the decisions just cited are based. It is argued that to allow a creditor to apply a fund to the satisfaction of his debt, upon which another has a claim with him, and not to compel him to resort to the fund upon which he alone has a claim, is inequitable and ought not to be sanctioned by a court of equity.

In *Arnold v. Harner*, 1 Freem. Ch. 509, the reasons for adopting and following the rule as established in England, were thus stated, the chancellor speaking for the court: "I consider the law well settled upon principles of equal justice and solid reason, that upon the death of one of several partners, a joint creditor has no claim for the payment of his debt out of the separate estate of the deceased partner, until the claims of the separate creditors have been first satisfied. It is true that joint creditors may come into equity to enforce their claims against the estate of a deceased person, and equity will then consider the claim, as it is considered at law, both joint and several; but this can only be done where the claims of the joint creditors do not come in conflict with those of the separate creditors. In such case, the priority of separate creditors is always preserved. Upon the death of one partner, the claim of joint creditors survives against the surviving partner, and is extinguished at law against the estate of the deceased partner, to which they can only resort through the aid of a court of equity, where the advantage thus thrown by accident upon the separate creditors will be preserved. And in such case it makes no difference that the surviving partner is insolvent, if the assets to be administered are purely legal; the separate creditors having acquired a priority at law, and having equal equity, that priority will be preserved. For where the equities are equal, the legal right must prevail. A different rule obtains where the assets are purely equitable, and where, therefore, both joint and separate creditors would have to seek the aid of a court of equity. In such case, neither party having a legal preference, and the surviving party being insolvent, the claimants would be decreed to take *pari passu*. It may, I think, be hence laid down, that in administering upon the legal assets of an insolvent partner, his property should be applied to the payment of his private debts, and partnership claims should not be reported for a *pro rata* dividend."

On the other hand, the decisions in many of the states of the union determine that joint creditors have as much right to the separate assets, both at law and in equity, as the separate creditors, unless special circumstances intervene which require their exclusion, and they are consequently admitted on an equal footing, whenever they are not shut out by the death of one partner, during the life of another, and thereby restricted to the legal liability of the survivor: *Baker v. Wimpee*, 19 Ga. 87; *Bardwell v. Perry*, 19 Vt. 292; *Grant v. Camp*, 21 Conn. 41; *The Bank of Kentucky v. Rizer*, 2 Duval, 169; *Whitehead v. Chadwell*, Id. 432; *Newman v. Bayley*, 16 Pick. 570; *Allen v. Wells*, 22 Id. 450; *White v. Dougherty*, 1 Martin & Yerger, 309 [17 Am. Dec.]; *Hassell v. Griffin*, 2 Jones, 117.

In some of the states where the English rule prevails, it has nevertheless been held, that where there is no joint estate, and no living solvent partner,

the joint creditors may prove against the separate estate of a deceased or bankrupt partner: *Sperry's Estate*, 1 Ashmead, 347; *Wilder v. Keeler*, 3 Paige, 167; *Emanuel v. Byrd*, 19 Ala. 596; *Rodgers v. Meranda*, 7 Ohio St. 179; *Cleghorn v. The Bank*, 9 Ga. 319. This doctrine was rejected in the principal case, and has also been rejected in some of the other states: *Murrill v. Neill*, 8 How. (U. S.) 414; *Weyer v. Thornburgh*, 15 Ind. 124.

EXECUTION SALES OF INDIVIDUAL PROPERTY FOR A PARTNERSHIP DEBT.—Questions regarding the application of the property of partners to the discharge of individual or of partnership obligations have usually arisen in equity or in proceedings in bankruptcy and elsewhere, in which the rules of equity jurisprudence could be readily applied and enforced. But in many instances these questions have arisen and may yet arise at law. Two writs of execution or of attachment may be levied, one based upon an obligation against a copartnership, and the other resulting from a demand against one only of the members of the same copartnership. In this case is the priority of the writs to be determined, as in other cases, by the priority of the respective levies; or will a writ against the copartners have as to their joint property precedence over a writ of prior date, and levy directed against the property of one member only; or, on the other hand, will a writ against the copartners be postponed, so far as regards the separate property of one partner, to a subsequent writ and levy against him alone? In many states, it is established that at law a sale of partnership property, under an execution against the firm, will transfer the legal title as against previously-levied writs issued upon judgments against the individual partners for their separate debts: *Conroy v. Woods*, 13 Cal. 626; *Watt v. Johnson*, 4 Jones, 190. But we apprehend that a levy and sale under a writ against the members of a copartnership, of the separate property of either member, will pass a title paramount in law to any which can be acquired under a subsequent levy upon the same property under a writ to enforce the separate and individual debt of the partner to whom the property belonged as his separate estate; and further, that when a partnership creditor has, by proceedings at law, acquired a judgment execution or other lien upon the separate property of one of the partners, or has taken any proceedings whereby, at law, he has secured the right to appropriate such separate estate to the satisfaction of an obligation incurred by the partnership, equity will not, at the instance of any creditor of such individual partner, wrest such right from the partnership creditor, nor compel him to postpone his proceedings until the individual creditors of the partner whose separate estate has been levied upon, have first received satisfaction therefrom: *Allen v. Wells*, 22 Pick. 450; *Cleghorn v. Insurance Bank of Columbus*, 9 Ga. 319; *Baker v. Wimpee*, 19 Id. 87; *Wisham v. Lipencot*, 1 Stock, 353; *Bowker v. Smith*, 48 N. H. 111; 2 Am. Rep. 189; *Straus v. Kerngood*, 21 Gratt. 584; *Irby v. Graham*, 46 Miss. 425; *Meech v. Allen*, 17 N. Y. 300.

BETTS v. UNION BANK OF MARYLAND.

[1 HARRIS & GILL, 175.]

DEED—EVIDENCE IS INADMISSIBLE TO SHOW that the consideration expressed in a deed was not the true consideration, because the same contradicts the deed. Additional consideration may be proved, however, which is not repugnant to the one recited in the deed.

DEED, WHEN IMPEACHED FOR FRAUD.—The party to whom the fraud is imputed will not be allowed to prove any other consideration in support of the deed than the one recited.

DELIVERY IS GENERALLY ESSENTIAL TO THE VALIDITY of a deed, but in Maryland, the same is not necessary, because by legislative enactment a deed is declared to be efficient and operative from its date.

APPEAL from the court of chancery. The facts appear from the opinion.

J. Glenn and Taney, for appellant.

R. Johnson, contra.

By Court, **STEPHEN, J.** In deciding the question which arises in this case, no little difficulty has been felt from the contrariety of opinions which have been expressed by judges of the greatest eminence and distinction, in cases very analogous, if not exactly similar to the present; and the importance of the principle now to be established as a rule of evidence, merits the most full and deliberate consideration. The question then presented to the court for their adjudication is simply this: Can marriage be given in evidence as the consideration of a deed of bargain and sale, which is expressed to be made for a money consideration only? The facts of the case are as follows: Enoch Betts, being considerably indebted to the Union Bank of Maryland, and being about to be married to Elizabeth Ball, on the seventeenth of March, 1819, executed a deed by which he conveyed to her, and her heirs, a lot or parcel of ground in the city of Baltimore, for the consideration, mentioned in said deed, of four thousand dollars. On the twenty-fourth day of the same month, and the same year, for the purpose of securing the payment of one thousand seven hundred dollars due to the Union Bank of Maryland, he executed to the said bank a deed of the same lot or parcel of ground, in trust, to sell the same for the payment of said debt, upon the terms and conditions therein specified. On the twenty-fifth of September, 1820, the president and directors of the Union Bank of Maryland filed their bill in the court of chancery, for the purpose of vacating and annulling the above-mentioned deed to Elizabeth Ball, upon the ground that they had no knowledge of its existence at the time the aforesaid deed was made to them. It is admitted that the consideration of four thousand dollars, specified in said deed, never was paid; but it is contended that the deed of conveyance may be supported by proving that the consideration in truth was marriage, and that such proof is legally ad-

missible. It is not deemed necessary to enter into a more full detail of the facts and circumstances belonging to this case; because if the proof that marriage was the real consideration is excluded by the rules of evidence upon the subject, the chancellor's decree, ordering a sale of the property for the benefit of the bank, under the deed of the twenty-fourth of March, 1819, and annulling that of the seventeenth of March, of the same year, to Elizabeth Ball, now Elizabeth Betts, ought to be affirmed. As has already been remarked, the authorities upon this part of the law of evidence are contrariant, and can not be reconciled. There is, however, one great and leading principle in the law of evidence relative to this subject, in the affirmance of which they all concur.— It is this, that no evidence is admissible which contradicts the deed. In *Maigley v. Hauer*, 7 Johns. 341, where it was attempted to prove by parol evidence an additional consideration to the one expressed in the deed, the court say: "It is a settled rule that where the consideration is expressly stated in a deed, and it is not said also, and for other considerations, you can not enter into proof of any other, for that would be contrary to the deed. This was so decided by this court in *Schemerhorn v. Vanderheyden*, 1 Johns. 139 [3 Am. Dec. 304], and again, in *Howes v. Barker*, 3 Id. 506 [3 Am. Dec. 526]. The same rule prevails in equity, according to the cases of *Clarkson v. Hanway*, 2 P. Wms. 203, and of *Peacock v. Monk*, 1 Ves. 128; and the remedy for the party, if the deed be contrary to the truth of the case, is by seeking relief in equity against the deed, on the ground of fraud or mistake, as was intimated in the case of *Howes v. Barker*, and as was adopted in the case of *Filmer v. Gott*, 7 Bro. Parl. Cas. 70." In the case of *Peacock v. Monk*, 1 Ves. 127, a bill was filed claiming the benefit of a trust under a deed, and the point was whether the plaintiff could prove a valuable consideration, as no consideration was expressed in the deed. Lord Hardwicke held that the proof ought to be read. "It differed," he said, "from the common case upon which the objection is founded; for to be sure, where any consideration is mentioned, as of love and affection only, if it is not also said for other considerations, you can not enter into proof of any other; the reason is because it would be contrary to the deed, for when the deed says it is in consideration of such a particular thing, that imports the whole consideration, and is negative to any other. But this is a middle case, there being no consideration at all in the deed."

Thus it appears that the supreme court of New York have

adopted the principle established by Lord Hardwicke, and excluded the proof of any other consideration where one is expressed in the deed, and it is not said for other considerations, on the ground that the admission of such proof would be contrary to the deed. This doctrine is certainly not reconcilable to the decision made in *Villers v. Beaumont*, 2 Dyer, 146. In that case the consideration in a deed of bargain and sale of lands was stated to be a sum of money, but it was averred, and found by the jury, that the indenture was made "as well in consideration of marriage (to make it a jointure and bar dower) as of the said sum of money;" and it was adjudged that although there was a particular consideration mentioned in the deed, yet an averment might be made of another consideration, which stood with the indenture, and which was not contrary to it. Which decision has since been sanctioned by Lord Coke. Thus it appears that both these conflicting decisions concur in the principle as indisputable law, that no averment of any consideration out of the deed can be made when it would tend to contradict the deed: 1 Phil. Ev. 425, 426.

It is not intended by this adjudication to recognize and adopt the rule of evidence as laid down by either of those high authorities, but simply to decide the question involved in this case upon the peculiar facts and circumstances which belong to it. It is admitted that the consideration mentioned in the deed now before the court was merely nominal, and never was in fact paid. Can the party, then, claiming under it, be permitted to prove that the consideration expressed in the deed was not the true consideration, but that the consideration was marriage? Upon a careful examination of the authorities relative to this subject, it appears that the greatest extent to which they have gone has been to allow an additional consideration to be proved, which is not repugnant to the one mentioned in the deed. But where a deed is impeached for fraud, the party to whom the fraud is imputed will not be permitted to prove any other consideration in support of the instrument: 1 Phil. Ev. 426. The case of *Clarkson v. Hanway*, 2 P. Wms. 203, is to the same effect. In that case the master of the rolls says: "Judging upon the face of a deed is judging upon evidence that can not err, whereas the testimony of witnesses may be false." It is the consideration expressed in the deed impeached as fraudulent, which excludes the proof of any other consideration in support of it, and not the circumstance that the party charged with the fraud has relied upon such consid-

eration in his answer, although such reliance might render the proof still more objectionable, because he had thereby put his defense upon the same ground. But in this case the proof that marriage was the real consideration, and not money, as mentioned in the deed, was inadmissible, as being contradictory to the language of the instrument, and not an averment of another consideration, not inconsistent with, but additional to the one expressed. In 1 Phil. Ev. 426, it is said that the rule which the authorities appear to have established is "that although a consideration is expressed, some other additional consideration may be shown, not inconsistent with the former." The consideration, then, which was offered to be proved in this case (though a valuable one), not being in addition to the one expressed, but as a substitute for it, was repugnant to the averment of the deed, and upon the admitted principle was inadmissible as being contrary to it.

To give the rule a greater latitude would, it is conceived, be repugnant to the general principles and policy of the law in relation to titles to real property, the evidences and muniments of which are required to be in writing, and enrolled for public inspection and information in cases of contracts made relative thereto.

The objection, that the deed to Mrs. Betts only took effect from the time of its delivery, cannot be sustained. As a general principle of the law, there is no doubt that delivery is essential to the legal existence and validity of a deed; but our legislative enactment puts that part of the controversy at rest, by declaring the deed to be efficient and operative from the time of its date.

It has been doubted whether the deed could be supported, even if proof that marriage was the consideration could be received. That ante-nuptial settlements, made in consideration of marriage, are good even though the party be then indebted: See *Reade v. Livingston*, 3 Johns. Ch. 494 [8 Am. Dec. 520], and the cases there cited; but as the evidence, that marriage and not money was the true consideration of the deed in this case, is not admissible, it follows that the decree of the chancellor must be affirmed.

Decree affirmed.

MARTIN, J., dissented.

CO. sideration in Deed NOT CONCLUSIVE.—It is now well established that the recital of a consideration in a deed is not conclusive, and that the

same may be contradicted by parol evidence: *O'Neale v. Lodge*, 1 Am. Dec. 377; *Schmerhorn v. Vanderheyden*, 3 Id. 304, note 306. See contra, *Graves v. Carter*, 11 Id. 786. There is one important qualification to the rule stated, which was recognized in the principal case and is considered at length in the note to *Schmerhorn v. Vanderheyden*, *supra*, and that is, that parol evidence is never admissible to show that the deed was executed without consideration, and thereby defeat it as a conveyance.

JOLLY'S ADMINISTRATORS v. BALTIMORE EQUITABLE SOCIETY.

[1 HARRIS AND GILL, 295.]

IN THE CONSTRUCTION OF POLICIES OF FIRE INSURANCE, the same strictness is not to be observed as in the construction of policies of marine insurance.

POLICY OF INSURANCE BEING SILENT on the subject, the determination as to whether certain repairs or alterations in the property insured were such as the insured were authorized to make, as being necessary for the use of the property, and whether the same were made in the usual way, are questions of fact for the jury.

ALTERATIONS AND REPAIRS IN PROPERTY, insured against fire, do not *per se* change the risk, and whether the risk has been increased thereby is a question of fact for the jury.

COVENANT. Appeal from the Baltimore county court. The defendants and appellees insured William Jolly's house against loss from fire, for a period of seven years, from December 26, 1814. In February, 1820, the plaintiffs, as administrators of Jolly's estate, made certain repairs in the house insured, and during the progress thereof the house was set on fire and destroyed. Nothing was said in the policy of insurance about repairs or alterations being made in the property insured. Verdict and judgment for defendants.

Williams, district attorney of the U. S., for appellants.

Wirt, attorney-general of the U. S., contra.

By Court, DORSEY, J. The Baltimore Equitable Society for insuring houses from loss by fire, being a private association formed by owners of houses in the city of Baltimore, by which, collectively, they agree to contribute to the payment of all losses by fire by them individually sustained, it appears reasonable that their policies should receive a fair and liberal construction, free from all captious technical exceptions.

The strictness and nicety which have been wisely adopted in the trial of questions arising on policies of marine insurance are

not, to their full extent, applicable to the policies of this society. The former are entered into by the assurer almost exclusively on the statements and information given by the assured himself; in the latter case, the insurers assume the risk on the knowledge acquired by an actual survey and examination made by themselves, not on representations coming from the insured. This association, therefore, formed for their individual accommodation and security, can not, upon any sound principles of construction, be viewed as involving in it a mutual relinquishment of the right of exercising those ordinary, necessary acts of ownership over their houses, which have been usually exercised by the owners of such property. It hence follows that the insured is authorized to make any necessary repairs in the mode commonly pursued on such occasions; but if, by the gross negligence or misconduct of the workmen employed, a loss by fire ensue; or if alterations be made in the subject insured, materially enhancing the risk, and not necessary to the enjoyment of the premises insured, or, according to usage and custom, were not the result of the exercise of such ordinary acts of ownership, as in the understanding of the parties were conceded to the insured at the time of insurance, and a loss by fire is thereby produced, then are the underwriters released from all liability to indemnify for such loss. The policy of insurance here being perfectly silent on the subject, and no general principle or rule of law having been established in cases like the present, by which to determine whether the repairs or alterations were such as the insured had authority to make, as being necessary to the user of the property, and whether, if authorized, they were made in the usual and customary way, the proper tribunal to decide those questions is the jury, and not the court.

It appears to have been conceded in argument, that ordinary, necessary repairs might be made by the insured; but not a thorough repair like the present. The proof of the appellants is, "that the repairs made on this house were necessary for the purpose of rendering it tenantable," and that they were made in the usual way. The bill of exceptions shows that by the word "repairs," both parties meant all that was done to the house. The distinction attempted to be taken has not been supported by any authorities, and, in common sense and justice, there can be no discrimination between the right to make ordinary repairs, and such a thorough repair as is necessary for the purpose of rendering the house tenantable.

It has been stated by the counsel of both parties, that there

can be found in the books no adjudication on a policy against fire analogous to the present. It becomes this court, then, maturely to deliberate before they sanction the doctrine contended for by the appellees, which, contrary to justice and the understanding and intention of the parties at the formation of their contract, annihilates all claim to indemnity on the part of the insured, and yet leaves the insurer in the full enjoyment of the premium for responsibility. It, perhaps, scarcely ever happens, that during the period of seven years, the usual term to which such policies are limited, some trifling alteration or addition is not made to the property insured, as a new door or window opened, an additional closet, shelf, or such like fixture erected; any of which acts, if the grounds assumed by the appellees are supported, change the identity of the property, create a new risk, and absolve the underwriters. Indeed, if alterations and additions are *per se* a change of the risk, it would follow that the erection of a parapet wall in a city, a substitution of brick for a wooden floor, or a marble for a wooden mantelpiece, or the introduction of a coal-grate in a chimney constructed for wood as the only fuel, though lessening the peril, would discharge the policy; as, according to the principles of maritime insurance, every change of the risk exonerates the underwriter, whether the danger be increased or diminished, or happen the loss from whatsoever cause it may. To infer without any express provision or necessary implication arising out of the contract itself, or public policy demanding it, that the insured surrendered all right to make such commonplace, trivial, unimportant additions to, and alterations of his property, as its safety or his convenience or comfort might suggest, is a construction too rigorous to be rational; the effect of which would be to render worse than useless those most useful and indispensable institutions in populous cities, the fire insurance companies, and give a fatal stab to our enterprising manufacturers. Who, if suing for a loss under a policy covering the manufactory and machinery, would be turned out of court without remedy or hope, if, perchance, the insurer could prove that the most immaterial alteration or improvement were made in his machinery, by substituting the power of the screw for that of the lever, the leather strap for the iron wheel, or the iron for the wooden shaft? But suppose all the rules of marine insurance applicable to the question at bar, can a case be found in which it was ever contended that to add to the equipment of a vessel insured,

a yard more of canvas, or an additional cleet or clew line, was to vacate the insurance?

The numerous and warmly litigated questions of deviation and change of risk which burden the records of courts of justice bear no analogy to that now under consideration. There, departing from the course of the voyage, or performing it at any other time than that required by the policy, subjects the vessel to different perils than those contemplated by the contracting parties; a flaw, a whirlpool, a breaker, may be encountered in one course of the voyage, which would be a cause of neither danger nor alarm at a mile's distance. The tempests or casualties attending the performance of a voyage to-day, bear no similitude or proportion to those attendant on a like voyage of to-morrow. But no such total revolution is wrought in the perils to a house insured against fire which has undergone alterations or repairs; it remains subject to the same perils, although their degree may be increased or diminished. It becomes a question of increase, not of change of risk, for the ascertainment of which the jury, and not the court, is the proper tribunal.

The only authority which was strongly relied on by the appellees' counsel, and which was pressed as strictly analogous to the case before the court, was that of the *Maryland Insurance Co. v. Le Roy and others*, 7 Cranch, 26, which was considered as turning, not upon the common principle of deviation, but upon the ground of a forfeiture of the insurance by a change of the cargo insured. The suit there instituted was upon a policy on the ship, and the right to recover, therefore, could not be affected by any change in the cargo, unless the risk were increased, or it were a violation of an express warranty. The supreme court, in reversing the judgment of the circuit court, negative the idea that their decision was bottomed on an increase of risk, and furnish not the slightest pretext for placing it on the ground of an express warranty. It can not, therefore, be viewed as determining any other than the familiar question of deviation; and although the reasoning of the court is not marked with that precision and perspicuity which is usually displayed by the learned judge, by whom the opinion was pronounced, yet great reluctance would be felt in putting a different construction upon it after an examination of the authorities on the subject, the facts in the cause, and the grounds upon which the reversal was claimed. The ship was insured "at and from New York, to five ports on the coast of Africa,

between Castle D'Elmina and Cape Lopez, including those ports, with liberty of touching and trading at all or any of said ports backwards and forwards, and at and from her last port on the coast to New York; with liberty of touching at the Cape de Verds, on her return passage, for stock, and to take in water." The declaration was for a total loss by the perils of the sea; and the bill of exceptions, among other facts, stated, "that the ship in the prosecution of her voyage arrived at the island of Fogo, one of the Cape de Verd islands, on the seventh of May, 1805, where the captain received on board four bullocks and four jackasses, besides water and other provisions, and unstowed the dry goods, and broke open two bales and took out forty pieces of each for trade. That the ship remained there until the twenty-fourth of May. That the time generally employed by a vessel in taking in stock and water at the Cape de Verd islands, is from two to three days, unless the weather should be very unfavorable; that the weather was good; and that the bullocks and jackasses incumbered the deck much more than small stock would have done." Upon these facts the court were prayed to instruct the jury that the taking the jackasses on board the ship while she lay at the island of Fogo, was not within the privilege allowed to the insured, to touch at the Cape de Verd islands, in the performance of the voyage insured, for the purchase of stock, and to take in water, and therefore vitiates the policy, which direction the court refused to give; but the court directed the jury that the taking in the four jackasses at the island as aforesaid, did not avoid the policy unless the risk was thereby increased. To this direction an exception was taken; and Mr. Pinkney, in showing error, alleges "that the court refused to say that the taking in of the jackasses discharged the underwriters, although it might produce delay. It is not stated that it did not produce delay, and the evidence shows that it did. The principle of deviation is not increase of risk, but delay. If, therefore, here was any delay, the policy was void from that time."

By thus arguing, that eminent lawyer admits that the policy was not vacated by the simple fact of taking the jackasses on board, but by the delay at the island of Fogo, for which delay no other reason was assigned. Indeed, when we advert to the facts in the cause, that the ship remained fourteen days at Fogo without pretext or apology for so doing, it is difficult to imagine how a momentary doubt could exist on the question of deviation. And it is much more difficult to comprehend why an objection

so obviously fatal to the claims of the insured should, by the prayer of the underwriters, be so loosely and indistinctly presented for decision to the court below. That the supreme court, by whom it was decided, view this case as turning principally on the point on which it is here made to depend, is manifest from the review taken of it by Chief Justice Marshall, in *Hughes v. Union Ins. Co.*, 3 Wheat. 166. He says: "The assured traded, and the delay was considerable and unnecessary; the risk, if not increased, might be and certainly was varied." But admit that the interpretation which has been given by the appellees' counsel to the case of *The Maryland Ins. Co. v. Le Roy and others*, be correct, and that the court there decided that the taking on board the jackasses, whether it caused delay or increased the risk or not, discharged the underwriters, this court should not follow a decision at war with reason, justice, and public policy, which is bottomed on a *nisi prius* determination, long since acknowledged by its author to have been overruled, and which is inconsistent with numerous decisions of tribunals of the highest authority made after argument and due deliberation. Among which may be numbered the cases of *Raine v. Bell*, 9 East, 195; *Kane v. Columbian Ins. Co.*, 2 Johns. 264; *Cormack v. Gladstone*, 11 East, 347; *Laroche v. Oswin*, 12 Id. 131; *Kingston v. Girard*, 4 Dallas, 274; and *Hughes v. Union Ins. Co.*, 3 Wheat. 159.

The case of *Stetson v. The Massachusetts Fire Ins. Co.*, 4 Mass. 330 [3 Am. Dec. 217] (not cited in the argument), though not containing the same facts, yet presented for decision a question, which in principle can not be distinguished from that now before the court. In his proposals for insurance Stetson represents his house (on which insurance was required) as connected with other buildings on one side only, and such at the time was the fact. Under the authority derived from the insured a frame building was subsequently erected and joined to the house insured, so that it became connected, in relation to other buildings, on two of its sides. It was afterwards consumed by fire, together with the building annexed to it. By one of the articles of the company (to the operation of which all persons contracting with them are subjected), it is provided that the insurer may declare the policy null and void in all cases where the insured shall have repaired or enlarged a building, and thereby rendered the risk greater. The question submitted was in effect, whether the court could *ex natura rei* pronounce the erection of the frame building an increase of risk, or whether that fact were a matter to be found by a jury. The learned judge, by whom the opin-

ion of the court was pronounced, states, "that the question may be examined upon general principles, and upon the terms of the contract." In considering it on general principles, he states that "if every the least alteration or enlargement of a building insured against fire is necessarily and of course material to the risk, and whenever it is made by the act or consent of the insured, is to vacate the policy, unless it should be renewed by the insurer, so close a restraint upon the party would place contracts of this kind in a state of complete uncertainty, and would render them so inconvenient as wholly to prevent them." That "the true reason why in a case of marine insurance, a deviation discharges the insurer, is not the increase of the risk, but that the party contracting has voluntarily substituted another voyage for that which was insured. This change of the voyage determines the contract from the time it happens. The same strictness is not requisite in an insurance against fire, where the building, although enlarged or repaired, remains the same, and it is only necessary to guard the insurer from an increase of risk, by an alteration of the building insured." He further states, that it is obvious that "an alteration may diminish and not increase the risk, and if this may be reasonably supposed in any case, then, whether the enlargement of a building insured has increased the risk of the insurer, is a question of fact to be determined by the jury."

It should not be forgotten that there is no express stipulation restricting the insured as to the acts of ownership he may exercise over his property, or the repairs or alterations he may cause it to undergo. All restraints of this character, therefore, arise from necessary implication founded on the presumed intentions and understanding of the parties, and are such as are called for by the dictates of reason, justice, or public policy.

Apply this doctrine to the case at bar, as exhibited in the appellants' proof, the truth of which must be conceded in granting the prayer of the appellees. All the work was done in the usual manner, and was necessary to render the house tenantable. The insurer, before he assumed the risk, viewed the property, examined its condition, considered all the casualties and incidents to which it might be liable, and, until the contrary is proved, is presumed to be as cognizant of these matters as the insured himself. Did he not know that the insured intended to derive benefit from the use and occupation of his house; that he contemplated keeping it in a tenantable condition? If so, does not reason, justice, and the understanding of the parties revolt

at the idea of an implication which should wrest from the insured the enjoyment of those important, invaluable rights, for the security of which, or an equivalent therefor, the very contract of insurance itself was effected? Nay, does not common sense, public policy, and fair dealing between man and man, demand that you should consider it as having been the intention of the parties, and as of the very essence of the contract, that the insured should exercise such acts of ownership over his property as were necessary to keep it in tenantable condition?

This being a case in which the intervention of a jury was indispensably necessary to adjust the rights of the contending parties, the county court erred in granting the prayer of the appellees, that the appellants were not entitled to recover; for which their judgment should be reversed.

Judgment reversed and *procedendo* awarded.

The question discussed and determined in the principal case, that where the policy was silent such repairs as were necessary to the property might be made by the insured, and that if the risk was not thereby increased the policy was not avoided, was determined in the same way in the case of *Stelson v. Mass. Insurance Co.*, 3 Am. Dec. 217; and the latter case has been frequently recognised as authority: See note thereto, p. 222.

LAMMOTT v. GIST.

[2 HARRIS & GILL, 433.]

LANDLORD AND TENANT.—A parol agreement between a landlord and tenant, that the latter should surrender the residue of his term in the premises leased to a purchaser, in consideration of which, the landlord agreed to give up the rent in arrear, is within the statute of frauds, and void.

REPLEVIN. Appeal from the Baltimore county court. The appellee, Gist, who was the plaintiff below, leased of one Shade, certain premises for one year, for a rental of fifty dollars, due on March 1, 1823. The defendant, as bailiff of Shade, levied distress, September 29, 1823, for said rent, on the personal property replevied in this action. Plaintiff offered to prove that in September, 1823, Shade agreed to sell and deliver the possession of the premises leased to him, to one Hughes, and that Shade, in consideration that plaintiff would deliver possession to Hughes in October, agreed to give up the rent in arrear. That he did deliver possession to Hughes in October. The evidence was admitted, and defendant excepted. The

property replevied was seized for the rent agreed to be released. Judgment for plaintiff.

Kennedy and Meredith, for appellant.

No counsel *contra*.

By Court, MARTIN, J. We think Baltimore county court erred in receiving parol evidence for the purpose it was offered, as stated in the first bill of exceptions. Gist held the property leased, under Shade, and that tenancy could not be determined by a parol license to quit the premises. The agreement was, that the lease should be surrendered and the rent discharged, and is embraced within the statute of frauds, which provides that no lease or term of years, or any uncertain interest, of or in any messuages, lauds, tenements, or hereditaments, shall be surrendered unless by deed or note in writing, or by act or operation of law. The release of the rent, and the surrender of the property, form one agreement—they cannot be separated; and to make the agreement available, it ought to have been in writing: *Botting v. Martin*, 1 Campb. 317; *Mollet v. Brayne*, 2 Campb. 103; *Thomson v. Wilson*, 3 Serg. & Low. 391.¹

In the second bill of exceptions there was a prayer by the avowant, that the court would instruct the jury he was entitled to recover. If the parol evidence received by the court, as stated in the first bill of exceptions, had been legal, this prayer might have been important, and then it would have been proper to consider the objections relied on in the argument, one of which was a variance between the agreement offered in evidence and that set out in the pleadings. But as this court has decided the parol evidence of the agreement, stated in the first bill of exceptions, ought not to have been received by the court, that evidence must be rejected; and being rejected, the cause stood only on the pleadings and the evidence offered by the avowant. The pleadings do not controvert that Lammott was the bailiff of Shade, and it was proved by testimony the rent was due.

We dissent from the opinions expressed by Baltimore county court, as stated in both bills of exceptions.

Judgment reversed, and *procedendo* awarded.

See note to *McC Campbell v. McC Campbell*, 15 Am. Dec. 62, as to how far the statute of frauds may be relied upon as a defense.

1. S. C. 2 Stark. 279.

CAUSTEN v. BURKE.

[2 HARRIS AND GILL, 295.]

ONE PARTNER CAN NOT MAINTAIN an action against his co-partner for personal services rendered for the co-partnership.

ASSUMPSIT. Appeal from the Baltimore county court. Issue joined on the plea of non-assumpsit. Verdict and judgment for defendant. The other facts appear from the opinion.

Mayer, for appellant, cited *Bradford v. Kimberly*, 3 Johns. Ch. 433.

Meredith, contra. Claims arising out of a co-partnership, as between the partners themselves, during its continuance, are cognizable alone in a court of equity. It may, therefore, be considered as an established rule, that until dissolution and an account liquidated by the partners, *indebitatus assumpsit* will not lie: *Smith v. Barrow*, 2 T. R. 476; *Harvey v. Crickell*, 5 Mau. & Sel. 340; *Lamatere v. Case*, 1 Wash. C. C. 436; *Murray v. Bogart*, 14 Johns. 318.

By Court, BUCHANAN, C. J. The first bill of exceptions being properly abandoned by the counsel for the appellant, it is considered as out of the case. The question arising on the second bill of exceptions is a question of construction.

The plaintiff and defendant, with several others, were associated together in business—they were partners in trade. If the contract which gave rise to this action was entered into by such of the members of the concern as were present in their individual characters, if it was a personal contract, then the plaintiff, under the pleadings in the cause, would be entitled to recover; as there is nothing to prevent one partner from suing another on a mere private undertaking. But if the undertaking by the defendant and the other partners present was not merely personal, but on account of the co-partnership, the plaintiff is not entitled to recover; on the general principle, that one partner can not maintain an action against his co-partners, for work and labor done, etc., on account of the partnership.

And we think that the engagement by the defendant and the others of the concern who were present to give the plaintiff five hundred dollars for going abroad on the business of the concern, in which he, as a partner, was equally interested as the other partners, was not a private individual contract, but an undertaking on account of the concern. The same engage-

ment entered into with a stranger would have been binding on the firm; and the present plaintiff, as a member of that firm, must have contributed his proportionate part of the sum contracted to be paid. And what is there in the mere circumstance of his being employed as the agent to transact the business required to be done in the place of a stranger, to give to the same terms an entirely different meaning and character, and to turn into a separate individual undertaking on the part of some of the partners a contract which in the case of another would have been considered as made on account of and binding upon the firm? We can perceive nothing. The services rendered were for and on account of the firm, the compensation for those services to be paid by the firm, and his just proportion of that compensation to be borne by the plaintiff, as one of the firm. He could not sue the firm of which he was himself a member, nor can he sustain this suit against one of his co-partners for services rendered the firm.

The court are of opinion that the judgment of the court below ought to be affirmed.

STEPHEN, J. The first bill of exceptions taken in this case being abandoned by the appellant's counsel, it only remains for this court to consider and decide upon the second. [After stating facts.] The general principle is clear and incontrovertible, that one partner can not sue another at common law for a partnership claim, unless there be a settlement of accounts between them and a balance struck. It was formerly held that an express promise to pay was likewise necessary; but the law now seems to be settled that such promise is not essential.

The reason is, that as between the parties, as partners, their relative rights can not be known, or the relation of debtor and creditor ascertained, until there is an adjustment of their accounts, either by themselves or by a bill in equity for an account. But it is equally clear and indisputable, that where one partner has an admitted claim against another, or, in other words, where one partner has in his hands money belonging to another partner, which he has not a right to carry to the partnership account, an action will lie at law to recover it, and that it is not necessary to resort to chancery for that purpose. This principle is established in *Smith v. Barrow*, 2 T. R. 476, where the court decided that one partner might maintain an action for money had and received against another partner, for money received to the separate use of the former, and wrongfully carried to the partnership account. Ashurst, J., says: "The sum now claimed

by the plaintiff did not belong to the partnership account; and as the defendant had received a sum of money belonging to the plaintiff alone, which he has wrongfully carried to the partnership account, he is liable to refund it in this action." Grose, J., says: "Supposing that the plaintiff had received this money, he would have been entitled to have set apart for his separate use the whole sum, except that part which belonged to the partnership account. Then the circumstance of the defendant's having received it, can not alter the right." So in the case now before this court, if the five hundred dollars had been paid to the plaintiff, according to contract, on his performing the stipulated service, can there be a doubt that he would have had a right to appropriate it to his own exclusive use? If he could, can his right be so materially changed by the bad faith of those with whom he dealt, in not paying it to him according to their agreement? In Gow on Partnership, 144, the law is stated to be, that where one partner pays a partnership debt out of his own individual funds, equity will enforce a contribution. Formerly, indeed, he says, contribution was always obtained through the medium of a bill in equity, although latterly, actions at law between partners for a contribution have become frequent. In support of this principle, see, also, *Wright v. Hunter*, 1 East, 20, which was an action at law by one partner against another for contribution, on account of money paid to a creditor of the copartnership.

This case likewise shows that the defendant in this case was liable to the whole demand, he not having pleaded in abatement that there were other partners. Lord Kenyon says: "As between a creditor and the partners, all are liable for the whole debt, though, as between the partners themselves, each is only answerable for his respective share. The plaintiff here stands in the relation of a creditor to the other three partners. He might sue all or one of them; and as the defendant has not pleaded in abatement, I think the whole money may be recovered from him." The case of *Holmes v. Higgins*, 8 Serg. & Low. 27¹, is distinguishable from the present, because in that case there was no express promise of compensation to the partner, whose services were rendered to the partnership. He was merely appointed to perform a particular duty, without a promise of payment. As to the liability of one partner to be sued by another in the case of an express undertaking, the case of *Van Ness v. Forrest*, 8 Cranch, 30, is referred to as a very strong

authority. In *Bradford v. Kimberly*, 3 Johns. Ch. 433, Chancellor Kent says: "In the case of joint partners, the general rule is, that one is not entitled to charge another a compensation for his more valuable or unequal services bestowed on the common concern, without a special agreement; for it is deemed a case of voluntary management. But where the several owners meet, and constitute one of the concern an agent to do the whole business, a compensation is necessarily and equitably implied in such special agreement, and they are to be considered as dealing with a stranger." Suppose, in this case, the partnership had been insolvent, would not Causten have had a right to recover his stipulated compensation from the persons contracting with him as individuals? Or would he have lost it? According to the evidence contained in the bill of exceptions, the promise was general and absolute, not qualified or conditional, and it amounted to a waiver of any right to have the partnership accounts adjusted prior to payment. If he had been selected for the agency, without an express promise of remuneration, it would have been similar to the case of *Holmes v. Higgins*, 8 Serg. & Low. 27, referred to in the argument. A partner is entitled to nothing for services rendered in and about the partnership concerns. When, therefore, he was employed for a valuable consideration to go on this business to the south, it shows that those who contracted with him did not deal with him in the character of a partner, but as they would have dealt with a stranger. Would not the money, when received by him, have belonged to him exclusively, or could it have been carried to the partnership account? If he would not have received it as a partner, it is clear that it could not have been carried to the partnership account. Why, then, make the right of recovering it to depend upon a final settlement of the partnership transactions? And it is only in such a case that a resort would be necessary to a court of equity to compel payment.

As to the necessity of declaring upon the special contract, the law is stated to be, that "with respect to debts for work and labor, or other personal services, it is a rule that however special the agreement was, yet if it was not under seal, and the terms of it have been performed on the plaintiff's part, and the remuneration was to be in money, it is not necessary to declare specially, and the common *indebitatus* count is sufficient:" 1 Chitty's Plead. 338. To the same effect is the case of *Mudd v. Mudd*, 3 Harr. & Johns. 438. Upon the subject of the liability of one partner to be sued by another, there is a very late case, *Coffee*

v. Brian, 11 Serg. & Low. 25.¹ The facts of that case were as follows: "Thomas Coffee, the plaintiff, John Coffee, and Brian, the defendant, were jointly concerned in the Irish butter trade; John Coffee consigned the butters to Brian in London, who sold them, and Thomas Coffee accepted bills drawn by John to the amount of the butters sent. The profits of the various transactions were divided between the three parties. Brian having received the proceeds from a certain quantity of this butter, Thomas expressed uneasiness at accepting bills in his own name without some security for the risk he incurred; when Brian engaged to provide for the bills at maturity, out of the proceeds already received. Thomas Coffee, having been obliged to pay the bills, now sued the defendant for the amount in an action on the bills, and for money had and received;" on which count the court thought the plaintiff was entitled to recover. In that case it was insisted that the whole transaction was a partnership concern, and that, therefore, an action would not lie by one partner against his co-partner, no balance having been struck, nor any agreement entered into to pay separately. In deciding this case, Best, C. J., observes: "It has been objected that this is a partnership transaction, and no doubt the money came to the defendant as the money of all three of the partners; but that has happened which divests them of the joint property in it, and vests it in the plaintiff. The defendant says: I have money in my hands, the produce of these butters, and if you will accept certain bills I will hold the money on your account, in case of your being called on to pay the bills. When the bills were paid, therefore, the money in the defendant's hands become separated from the partnership account." Park, J., says: "A partner may sue for a balance due to him upon an account closed, and an agreement to pay the amount, and this is a case of the same description." This case establishes the principle that one partner may support an action against another partner without ascertaining by a settlement of their partnership dealings, whether he is a debtor or creditor of the concern, where there is an express engagement by one partner to pay him for a particular service rendered to the partnership, out of the partnership funds; for Park, Justice, observes: "The butters were consigned on the account of three, but it was necessary that one of them should accept bills, and Thomas Coffee refused to do this without some kind of security; upon which the defendant agrees to appropriate for

1. S. C., 3 Bingham. 54; 10 Moore, 341.

that purpose money already in his hands." This case could only have been likened to an account closed, and an agreement to pay the balance, upon the ground that the express assumption of the partner to pay his co-partner, if he should be compelled to pay the bills when they became due, the amount he should so pay amounted to a waiver of the settlement of their partnership transactions; and to an acknowledgment or admission of his right to receive the promised indemnity or reimbursement, without such a settlement. If the case now before this court is to be viewed under the aspect of a partnership transaction, the above authority, it is conceived, settles the principle, that for a sum of money expressly promised by one partner to another for a particular service rendered to the concern, he may sue in a court of common law without an ascertainment of the relation of debtor and creditor first having been made. And it is here worthy of remark that the rigor of the law upon this subject has been lately much relaxed; for although it was formerly holden that there must not only be a balance struck, but an express promise to pay, yet it is now well settled that such express promise is not necessary to enable one partner to sue another at law. But if this case is not to be considered as a partnership transaction, but as a contract between those partners who were present and the plaintiff, in their individual capacities, the right of the plaintiff to recover in this suit is entirely free from doubt, there having been no plea in abatement filed in the cause.

I am of opinion that the judgment ought to be reversed.
Judgment affirmed.

RIGHT TO SUE COPARTNER AT LAW.—It has been frequently determined that one partner has no right to sue his copartner at law, upon any matter arising out of, or connected with, the copartnership, unless there has been a settlement of the copartnership accounts, and a promise by the defendant to pay the balance: *Kennedy v. McFaddon*, 5 Am. Dec. 434; *Murray v. Bogert*, 7 Id. 466; see *Duncan v. Lyon*, 8 Id. 513.

WATERS' REPRESENTATIVES v. RILEY'S ADMINISTRATOR.

[2 HARRIS & GILL, 305.]

REMEDY AT LAW BEING GONE, chancery will not revive it in the absence of any accident, fraud, or mistake.

SURETY WHO HAS PAID THE DEBT may compel his co-surety to make contribution; or he may by substitution take the place of the creditor and ac-

quire all his rights against the principal debtor. He can acquire no rights that the creditor did not have, and can not compel a contribution by the representatives of his co-surety against whom the creditor had no remedy.

SURETIES ON A JOINT BOND, WHILE LIVING, are both liable to the creditor of their principal, and one may recover against the other a just proportion of what he is made to pay; but if one dies, the remedy as to him is gone, and the duty and the remedy survive against the survivor. If the survivor pay the debt, his only remedy is against the principal.

APPEAL from an order of the Montgomery county court, sitting as a court of equity.

The opinion states the facts.

F. S. Key and Z. Magruder, for appellant.

No counsel *contra*.

By Court, **BUCHANAN, C. J.** It appears from the admissions in the cause that on the seventeenth of September, 1806, George Riley and Richard Waters, as sureties, entered into a joint administration bond, with Meshach Browning, administrator *de bonis non* of John Holmes; that Richard Waters died in the year 1810, and George Riley, in 1814 or 1815, on whose estate the appellee administered; that after the death of Waters, judgment to a considerable amount was obtained on the administration bond against Browning, and Riley, the surviving sureties, on account of which large payments were made by Riley, Browning being insolvent; that the bond was drawn and executed by order of the orphans' court of Montgomery county, in the form in which it appears, by which tribunal it was intentionally required to be "joint" and not "joint and several;" and that since the death of Waters, his real estate has been sold for the payment of his debts, under proceedings regularly instituted for that purpose.

The proceeds of which, in the hands of the trustee, are sought to be subjected to the payment of half the amount so paid by George Riley, on account of the judgments rendered against him and Browning on the administration bond, which is resisted on the part of the heirs and representatives of Waters. In the case of a joint bond, the remedy at law survives against the surviving obligor, and is lost as against the representatives of him who first dies.

If, then, this was a suit at law on the bond, by those interested in the estate of Holmes, against the representatives of Waters, it clearly could not be sustained, the remedy, by the death of Waters, having been lost as against his representatives.

Nor could chancery, in proceedings between the same parties, fix the representatives of Waters with a liability which did not exist at law. The general rule being, that where the remedy at law is gone, chancery will not revive it in the absence of any accident, fraud or mistake; to which the case of a bond where all are principals has been held to be an exception, each being equally benefited, and under an equal original moral obligation to pay the debt, independent of the bond, to which equity relates back when the remedy at law on the bond is gone. But in the case of a surety, who is bound only by the bond itself, and is not under the same moral obligations to pay, equity will not interfere to charge him beyond his legal liability.

And surely there is no evidence here of either mistake or fraud. The act of assembly under which the bond was taken does not require that such bonds shall be "joint and several," but is silent on that subject, and the admission stated in the record is, that it was intentionally ordered by the orphans' court to be drawn and executed as a joint bond. Mistake, then, there was none, since it is admitted that what was done, whether judiciously or injudiciously, was intentionally done. And there is as little evidence of fraud of any kind. On whom could fraud have been committed? Not by the parties, or either of them, upon the orphans' court, because they executed the bond under and in pursuance of the directions of the court; and certainly not by the court itself, of which it may be proper to remark there has not been the slightest insinuation. And Waters, not having been a principal in the bond, but only a surety, the exception in relation to principals who are under the same moral obligation to pay the debt, being equally benefited, would not reach the case.

Is there, then, in this case, anything to enable a court of chancery to extend to the appellee any relief, to which those interested in the estate of Holmes would not have been entitled? If there is, we have not been able to perceive it. There is no doubt (as a general principle), that a surety, who has paid the debt, may compel his co-security to make contribution; or he may, by substitution, take the place of the creditor, and acquire all his rights against the principal debtor. But he can acquire no rights that the creditor had not, and can not, therefore, compel a contribution by the representatives of his deceased co-security, against whom the creditor had no remedy. So long as the securities in a joint bond are living, the creditor has his remedy against both, and one may recover against the other a

just proportion of what he is made to pay, both being under the same obligation to pay. But if one dies, the remedy as to him is gone, and the duty and the remedy both survive against the survivor, and there being nothing due from the representatives of the other to the creditor, a payment by the survivor can not be for, or on their account, nor can it create any liability in them that did not before exist. In such a case the surviving surety pays only his own debt, in which the representatives of the other have no concern, and his only remedy is against the principal debtor. This is just that case: on the death of Richard Waters, the remedy on the administration bond of those interested in the estate of Holmes, survived against George Riley, the surviving co-security, and Browning, the administrator and principal in the bond, with no liability resting on the representatives of Waters. The payments, therefore, by George Riley, on the judgments obtained against him and Browning, could create no charge against the representatives of Waters, on account of debts, for which they were in no way responsible, and which could not, by the creditors, have been enforced against them either in law or equity. In this view of the case, we think that the proceeds of the real estate of Waters, in the hands of the trustee, can not be charged with any proportion of the sums paid by George Riley on account of those judgments, and that the decree ought to be reversed.

ARCHER, J. Two objections have been made to the decree of the court below.

1. That the bond is void, being a statutory bond, and not according to the form prescribed by the act of assembly, not having the words, "not already administered," in the condition, as required by the act of 1798, c. 101, sub c. 5, sec. 6.

2. That at the death of Waters the liability was extinguished both at law and in equity.

Upon the first question it must be remarked, that the legislature, by the act of 1798, c. 101, sub c. 3, sec. 11, in prescribing the form of the condition of a bond to be executed by an executor or administrator, never intended that the form should be literally pursued, but they intended only to prescribe the substance and effect of the condition. This section expressly declares, that the condition shall be to the following effect; and then gives the form: The sub. c. 5, sec. 6, of the same law declares that the letters, bond and oath, of an administrator *de bonis non*, shall be in the form directed in the case of an execu-

tor, except that the words "not already administered," shall be added in the proper places. By looking at the form of the bond, oath and letters, prescribed in the section previous to the fifth section, it will be discovered that these words could not have been intended to be inserted in the condition of the bond, there being in the words of the legislature, no proper place for their insertion. The bond is perfect without them, by barely stating the obligation to discharge the duties of administrator *de bonis non*, instead of those of executor or administrator; and when this change in the phraseology is effected, the condition corresponds in every particular with the condition prescribed by the act.

The legislature must have intended the insertion of the words "not already administered," to apply to the oath and the letters, in which alone, according to the forms they have prescribed, would there be appropriate places for the insertion of such words.

But if by any construction the bond could be considered as specially referred to, and being one of the instruments indicated as containing a proper place for the insertion of these words, I would not wish to be understood as intimating an opinion that on a failure to insert these words the bond would, therefore, be inoperative and void. On the contrary, I think that where the legislature prescribes the substance of a bond, and the bond is so drawn as to include every obligation imposed by the law, and to afford every defense given by it, it will be sufficient, notwithstanding it may be slightly variant from the literal form set out. This is the doctrine maintained in *Rhodes v. Vaughan*, 2 Hawk's N. C. 167, and I would adopt it here as consistent with reason and propriety. Now, the designation of the administrator by the name of administrator *de bonis non* as explicitly and intelligibly defines his duties as if it had been in so many words stated that he was to administer on "goods not already administered." Of course, his obligations are the same, and he would be deprived of no defense he might otherwise have had.

With regard to the second objection, it is perfectly clear, as a general principle, that where a bond is joint, and one of the obligors die, the remedy of the obligee exists against the surviving obligor alone, and that it is extinguished against the representative of the deceased obligor; and that in ordinary cases equity will not interpose to give relief to the obligee by enabling him to pursue the estate of the deceased obligor in the hands of his representatives. But there are exceptions to

this general rule, as where a bond is made joint by fraud, ignorance, or mistake, in which cases equity will revive the duty. So, too, where the lending is to two, and they both have the benefit of the loan, there exists on the part of both obligors a moral obligation to pay, and equity will enforce the obligation against the representatives of the deceased obligor, although the bond be joint, and not several, as in the case of *Simpson v. Vaughan*, 2 Atk. 33. The borrowing on the one side, and the lending on the other, created, in the language of Lord Hardwicke, a reasonable presumption that the bond was either through fraud or mistake, or for want of skill, made a joint bond, instead of a joint and several bond. The original contract of lending and borrowing was that each and both should pay, and in such case the court will presume fraud, ignorance, or mistake, in the change of the contract from a joint and several to a joint contract. A surety in a joint bond, not having participated in the borrowing of the money, or in its original consideration, is bound to the obligee by no moral obligation whatever to pay, but merely by the legal force of the bond, and there would be nothing in such a case upon which to build an equity, by which the duty as against him should be revived. These are the doctrines as it respects obligees enforcing obligations which are joint against the representatives of deceased obligors.

It remains to be considered how far these doctrines can be assimilated to the cases of sureties in joint obligations claiming contribution. And here it is necessary to consider upon what this doctrine of contribution is founded. It is said by the court in *Deering v. Earl of Winchelsea*, 2 Bos. & P. 272, that it is founded on a principle of equity, and not on a contract; but in *Claythorne v. Swinburne*, 14 Ves. 169, it is perhaps more properly intimated that as it is founded in equity all who become sureties may be considered as contracting with regard to the principle of equity, which demands contribution. It is, then, a principle of equity that the losses of the sureties are to be equally borne, and the contract between the sureties is in reference to this doctrine of equity. This equitable principle of contribution extends to joint as well as several bonds, and to sureties, where even their names appear upon different instruments: *Deering v. Earl of Winchelsea*, 2 Bos. & P. 270. If it be built either upon the principle of equity alone, or on a contract in reference to the existence of such a principle, can the accidental death of a joint obligor defeat this equity? Sure-

ties always having reference to this equity rely on the contribution to lessen their responsibilities, and ultimate, eventual, and contingent losses, and, of course, look to the character, solvency, and safety of their co-securities, deriving from those circumstances a greater security. It is impossible to say that if the contribution is founded in contract, it could be defeated by the death of the co-security; and if the contribution depend not on contract, but upon equity, that such equity can be defeated by the death of one and the survivorship of the other obligor. In the case of an obligee pursuing a surety's estate, equity will not interpose, because where equity is equal the law must prevail, and the bond as to his estate is extinguished at law. Now the surety's equity is equal to the obligee's, no consideration passes between them, there is no moral obligation to pay, and he is only bound by the letter of his contract. How different is the case of a demand for contribution there; there is no equality of equity if one pays the whole, in saying he must bear it. There exists between them a clear moral obligation to apportion the loss, to say nothing of a contract between them, which would demand the interposition of equity to lighten the burden which has been thrown upon one of them.

The obligee can not enforce a bond extinguished at law, for he has no equity which would give it life. The surety does not even seek to revive the bond in asking contribution of his co-security. He asks it in virtue of a consequence which has befallen him from the original signature. He does not, in any case, ask to revive it, for that could not be done; his payment alone had extinguished it. But he asks it, because it would be against conscience that the estate of one who had entered into the suretyship with him, between whom there was a privity, and in relying on whose solvency and ability to relieve him from a portion of any burden which might fall on him, he had entered into the bond, should be entirely exonerated. To say that the bond was extinguished as against Waters' estate, does not meet the question. For the equity of the survivor, who is obliged to pay, looks to the source and origin of the transaction, and will and ought to coerce that original obligation that existed between them, and which is founded on the highest and clearest equity and justice.

Any contrary view must be grounded on the notion that the sureties in the bond looked to its joint character, were acquainted with the legal principles which attached to it, and

gravely contemplated their exoneration by death; which would be a very forced presumption, utterly inconsistent with fact, and with all those motives which experience teaches us operate upon mankind in such situations. I do not mean to assert that contribution is founded on contract; it would be sufficient to justify my view that it has its foundation on a moral obligation. But I can not but think that there is much reason for saying that it may be viewed in the light of a contract; for contribution is so obvious an equity, that every man must be supposed to look to it; and looking to it, I think it could violate no principle to say that the sureties, in case of loss, tacitly enter into a contract to bear each a portion of the burden. And, although it is positively asserted that contract has nothing to do with the liability, yet, is not this doctrine clearly contradicted by the fact that courts of law maintain actions of assumpsit, in which contribution is enforced? For how would such an action lie but upon the idea of a contract, express or implied? If it be said that it lies on the principle of justice, or on moral obligation, this, in itself, will not be sufficient, unless from such moral obligation you can infer a contract. And it will be found in *Peck v. Ellis*, 2 Johns. Ch. 136, that the jurisdiction of courts of law in contribution between sureties, is expressly placed upon the ground of an implied assumpsit, arising from the knowledge of the general principle, that equality is equity.

It has been correctly remarked that "rights claimed by, and injuries arising from survivorship, are not viewed in a very favorable aspect, either at law or in equity:" *Jenkins v. De Groot*, 1 Caine's Cas. 122. And this case, it strikes me, is of all cases which could be selected the least favorable for enforcing advantages claimed to the deceased's estate from the survivorship of his co-security.

I am clearly of opinion that the decree of the court below was correct, and that it ought to be affirmed.

Decree reversed.

CONTRIBUTION BETWEEN CO-SURETIES: See *Burrows v. Carnes Ad.*, 1 Am. Dec. 677; *McCormack v. Obannon*, 5 Id. 509.

BERRY v. GRIFFITH.

[2 HARRIS & GILL, 337.]

AMENDMENT—SHERIFF'S RETURN TO A FIERI FACIAS may be corrected, so as to make the same conform to the truth, and it is the sheriff's duty to so correct it.

SHERIFF CAN NOT SELL PROPERTY that has not been levied upon, but a general description in the schedule and advertisement of sale is sufficient.

SHERIFF'S RETURN SHOULD BE REGULAR for the security of purchasers, and should describe the premises with precision, but it is sufficient if the property sold can be clearly identified.

PROPERTY LEVIED UPON MAY BE DIVIDED, and a part sold, if such part is sufficient to satisfy the judgment.

TRESPASS *quare clausum fregit*. Issue joined on a plea of not guilty. Verdict and judgment for defendant. Appeal from the Montgomery county court. The opinion states the facts.

Magruder, for appellant.

F. S. Key, contra.

By Court, BUCHANAN, C. J. This was an action of trespass for cutting down trees in a close, alleged to be the close of the appellant, who was the plaintiff below.

The appellant claims title to the land on which the trees were cut, under a devise from his father; and the defendant rests his defense upon a purchase of the same premises by himself and Henry B. Griffith, from the sheriff of Montgomery county, at a sale by auction, in virtue of a *feri facias* regularly sued out of the Montgomery county court. And the sole question presented to us in argument is, whether the sale made by the sheriff of the land on which the trespass is supposed to have been committed, was a valid sale?

To prove that the sale was irregular and void, the appellant offered in evidence the inventory and appraisement, in which the land upon which the *feri facias* was levied, is described as "part of a tract of land called Charles and Benjamin, containing five hundred acres of land more or less," valued at six thousand dollars. The sheriff's advertisement of sale, which is of "all the right, title, interest, and estate of the said Elisha D. Berry, of, in, and to part of a tract of land called Charles and Benjamin, containing five hundred acres, more or less," both of them stating it to be taken by virtue of a writ of *feri facias* at the suit of William Willson and Anna Maria his wife. And also a paper, which it is admitted was prepared and filed by the sheriff as his return to the *feri facias*, and in which the land sold is described as "part of a tract of land called Charles and Benjamin, lying on the northwest side of the Baltimore road, containing two hundred and fifty acres, more or less." And all of them describing it as the land of Elisha D. Berry. And the defendant produced a corrected return by the sheriff of the

feri facias, on the return-day of the writ. That corrected return is full and special, and sufficiently describes the land sold, and entirely supersedes the paper that was first prepared by the sheriff as his return; which paper, if admitted to be imperfect as a return, can not avail the appellant, as it will not be denied that a sheriff has a right, in due time, to correct his return to a *feri facias*, so as to make it conform to the truth of the fact, whatever that may be, and to give it effect and legal operation; and, indeed, it is his duty to do so, not only as respects himself, but all others concerned, and purchasers not less than others, who commit themselves to the accuracy and integrity of sheriffs.

In this case it is not denied that the correction was in time; nor is it contended that the return, standing alone, is upon the face of it defective, but it is supposed that there are discrepancies between the return, the inventory and appraisement, and the advertisement of sale, which vitiate the whole proceedings, and render the sale void. With respect to certainty in the description of the property, we do not perceive the fatal discrepancies that are supposed to exist. The corrected return describes the land levied upon as the property of Elisha D. Berry, to be "all that part of the tract of land called Charles and Benjamin, which was devised to Elisha D. Berry by his father," with a reference to the will, and states the amount to which it was appraised to be six thousand dollars, referring also to the schedule or inventory. Between the description, then, of the land levied upon, as given in the return, and the inventory and appraisement, there is no discrepancy, but the land clearly appears to be identical. In the latter it is described as part of a tract of land called Charles and Benjamin, the property of Elisha D. Berry, containing five hundred acres, more or less, and appraised to six thousand dollars. In the former as all that part of the tract of land called Charles and Benjamin, belonging to Elisha D. Berry, which was devised to him by his father, stating the amount of the appraised value to be the same as that set out in the inventory and appraisement, and showing, by the reference to that paper, which is made a part of the return, the quantity of acres to be the same. The only difference being this: that the return professes to show in what manner Berry acquired title, by reference to his father's will, which the inventory does not. But the two papers manifestly show the land devised to Berry by his father, and the land levied on to be the same; and the same may be said of the advertise-

ment of sale, which is of all the right, title, interest, and estate of Elisha D. Berry, of, in, and to, part of a tract of land called Charles and Benjamin, containing five hundred acres, more or less, taken by virtue of a writ of *fiери facias*, at the suit of William Willson and wife. This paper does not, to be sure, set out the means by which Berry acquired title, but it describes the land seized under the *fiери facias* as the property of Berry, by its name and contents, as it is described in the other two papers. And it is difficult to wink so hard as not to see that they all manifestly relate to the same land, and describe it with sufficient certainty. But it is not true that lands taken in execution, must be described in the schedule and advertisement of sale, with technical minuteness. If it were so, it would, perhaps, be found that there are few titles in the state, acquired by purchase at sheriff's sales, that might not be shaken. The sheriff can not sell what has not been levied upon, but a general description in the schedule and advertisement of sale is sufficient.

The return should regularly, for the security of purchasers, describe the premises with precision; but it is enough if the description be such as that the property sold may be clearly identified. In this case the land sold was a part of the premises levied upon and advertised, and that part is described in the sheriff's return in a manner by which it may be sufficiently known and ascertained. But it is contended that the sale was void because a part only of the premises seized and advertised was sold, on the ground that the sheriff was not legally authorized to sell a part only, but was bound to sell the whole of the land levied upon. We can not, however, assent to the proposition. Sheriffs, it is believed, are already sufficiently disposed to sell more than is necessary; and it would be pregnant with mischief to the community if a sheriff who lays an execution for one hundred dollars on a tract of land worth ten thousand dollars should be held to be obliged to sell the entire tract, and could not sell such part as might be sufficient to discharge the debt. On the contrary, we think that in such a case the sheriff is not only authorized to lay off and sell such a proportion of the land as may be found sufficient to satisfy the debt, but that he ought to do so, and not to sacrifice at auction more than may be found necessary. Or, suppose a sheriff having taken in execution an entire tract of land, finds it will sell to a greater advantage if divided and sold in lots than if sold altogether, and accordingly lays it off into lots, and sells them separately to different persons,

would it, in such a case, be said that the sale of each lot would be void because the sale of neither was the sale of the whole? And yet the doctrine contended for here, if maintained, would lead to that length.

We can perceive nothing wrong in the sale and return in this case, and affirm the judgment.

Judgment affirmed.

See, generally, as to amendments to writs of execution and the returns thereon, 13 Am. Dec. 173, *et seq.*, note.

WOLF v. WOLF'S EXECUTOR.

[2 HARRIS AND GILL, 382.]

DISCOVERY—A DEFENDANT IN EQUITY is not bound to make any discovery in answering a bill that would subject him to a criminal prosecution. It must appear, however, from the bill or plea that his answers would subject him to punishment.

DISCOVERY MAY BE HAD, not only to support an action then instituted, but as auxiliary to the maintenance of an action then contemplated to be brought.

APPEAL from Frederick county court, sitting as a court of equity. Demurrer to the bill, which was overruled. The appellant was the defendant below. The opinion states the case.

W. Schley, for appellant. The discovery sought would criminate the appellant and she was not bound to answer: *Cooper's Plead.* 202; *Fenton v. Hughes*, 7 Ves. 290; *Cartwright v. Green*, 8 Id. 405.

Palmer and Ross, contra. *Sharp v. Sharp*, 3 Johns. Ch. 407; *Le Roy v. Veeder*, 1 Johns. Cas. 417; *Chincey v. Tahourden*, 2 Atk. 392; 1 Hale's P. C. 505, 515; *Verplank v. Caines*, 1 Johns. Ch. 57.

By Court, **STEPHEN, J.** This is the case of a demurrer to a bill of discovery filed by the appellee against the appellant, on the equity side of Frederick county court, on the ground that the matters and things charged in the bill, of and concerning which a discovery is sought to be obtained, would or might, if confessed or answered by the respondent, subject her to punishment. The principle is uncontrovertibly clear and well established that a defendant in equity is not bound to make any dis-

covery in answering such a bill as would subject her to the punishment of the law by a criminal prosecution, or would cause her to incur any pains, penalties or forfeitures. In this respect the principles of equitable jurisprudence interpose the same shield of protection, by which a witness is guarded in a court of common law; but it is equally clear that if no such penal consequence will follow, it is the undoubted right of the complainant to ask, and the duty of the defendant to make, the discovery in aid of the administration of civil justice.

In examining the allegations in the bill, it is not perceived that they are of such a character as would, if answered, subject the respondent to the apprehended consequences. She was the widow of the complainant's testator, and shared largely in the bounties of his will, and it is presumed in consequence of that relation, most, if not all his money and choses in action, passed into her custody and possession on his death. The allegations in the bill are nothing more than a charge of withholding from the complainant, the executor, who is legally and rightfully entitled to them for the purposes of administration, a certain sum of money, and certain choses in action, belonging to the estate of his testator.

The only feature of the bill, which seems to cast the most distant look towards a criminal accusation, is that part of it which charges that no person was present when she possessed herself of the money, bonds and notes; but it is most manifest that this averment was not made to give a color of criminality to her conduct; but to indicate the necessity of appealing to her oath, to enable the complainant to prosecute the suit against her, which was then pending at law, or any other suit which he might thereafter find it necessary to institute. The charge is, "that no person was present when the said Mary Wolf took possession of the money aforesaid; therefore, your orator hath no legal proof to support his said action against Mary Wolf, without a discovery of the facts by the said Mary Wolf in this honorable court on oath." It is not necessary, as was contended by the counsel for the appellant, that the discovery must be of matter necessary to support the action then pending against her in Frederick county court; because the position is undeniable, that a discovery may be had, not only to support an action then instituted, but as auxiliary to the maintenance of a suit then contemplated to be brought. This principle is clearly laid down by Cooper, in his treatise on Pleading in Equity, 191, 192, where he says: "Where a bill was brought for a discovery in aid of

an action intended to be brought, a demurrer, upon the ground that a bill will not lie merely for a discovery to enable the plaintiff to go to law, where the plaintiff had not actually brought his action, was overruled." In support of this doctrine, he cites: *Moodalay v. Morton*, 1 Bro. Ch. 469; 2 Dick. 652.

Where a crime is charged in the bill, it is the privilege of the respondent not to be compelled to confess either the offense charged, or any fact which may aid in the prosecution of it. This principle will be found in *Claridge v. Hoare*, 14 Ves. 65, laid down in the following words: "A defendant has a right to insist that he is not to be compelled to answer, not only the broad and leading fact, but any fact, the answer to which may furnish a step in the prosecution, if any person should choose to indict him." But it must appear, either by the bill of the complainant or by the plea of the defendant, that his answer may subject him to punishment, or he will be compelled to make the discovery asked for in the bill. As if a bill states the marriage of the defendant with a particular woman, this of itself is no offense; but if he pleads that she is his sister, that fact would constitute the alleged marriage a criminal act, and he may refuse to state anything more, or to speak as to any fact or circumstance which may form a link in the chain. For this principle, see, also, *Claridge v. Hoare*, 14 Ves. 64, where the lord chancellor, speaking in relation to this subject, says: "The first consideration is, whether an indictable offense is stated. For the consideration of that question, the fact appearing upon the plea, the embezzlement, contrary to the late act of parliament, must be taken to be true; also that all the matters stated in the bill relate to the transaction, so stated in the plea, as criminal. Then the bill and plea together bring forward the case of an individual charged with felony, and an agreement between several other persons, of which the object was to prevent a prosecution." In the case before this court, there is nothing in the allegations of the complainant, or in the defense of the defendant, which indicate a criminal charge, to a prosecution for which the respondent might render herself amenable, by responding to the facts charged in the bill, or the interrogatories therein contained.

Decree affirmed.

HOYE v. PENN.

[2 HARRIS AND GILL, 473.]

CREDITOR HAS A RIGHT TO RESORT TO ALL THE PROPERTY of his two debtors for the satisfaction of a joint debt, owed by them to him, and chancery has no power to decree that if the property of one of the debtors shall not be sufficient to discharge one half the debt, the creditor shall not look to the other debtor for the deficiency.

APPEAL from the court of chancery. The chancellor dismissed the petition. The opinion states the facts.

Boyle, for the appellant.

Magruder, *contra*.

By Court, MARTIN, J. We can not sanction the rule laid down by the chancellor in this case, and on which his last decree is founded.

The original decree directed that the trustee should, in the first instance, sell so much of the lands of Penn as would be sufficient to raise the one-half of the debt, and so much of the lands of Waters as would be necessary to make the other half; it further ordered, if a sufficient sum should not be produced by the first sale to discharge the debt, the trustee should proceed to sell the residue of the lands of both for that purpose. This course of proceeding was directed for the benefit of the debtors, as a matter of equity between them, but not to operate ultimately to the prejudice of the creditor. It was a joint debt due by Penn and Waters; each party was answerable for the whole; and we think it a clear position, that where a creditor has a right to resort to the joint and several funds of two debtors for the payment of his claim, the chancellor has no authority to limit that right and decree; if the funds of one debtor shall be sufficient to discharge the one half of the debt, the creditor shall not look to the other debtor for the deficiency. In this case all the lands of both Penn and Waters were sold under the decree, and a fund, more than sufficient to pay the debt, was produced by the sale. Whether this sum was made from the sale of Penn's lands or Waters' lands is a matter of no import to Hoyer. He is not interested in the inquiry. There is a fund in the hands of the trustee, or court of chancery, from the sale of lands answerable for his debt, and he is entitled to the whole amount of it, before the representatives of either Penn or Waters can have a claim to any part.

It has been contended that the sale made by the trustee, and

the report of the auditor founded on it, and directing how the supposed surplus should be disposed of, having been confirmed by the chancellor, Hoyer is concluded by it; that he is now too late; he ought to have made his objection before the confirmation, and while the subject was open for examination. This would be requiring an impossibility of Hoyer. At the time the sale of the trustee and report of the auditor were confirmed, it was not known any objection against the proceedings existed. The inability of the purchaser of Waters' land to pay, did not then appear, nor was it disclosed until long after the confirmation. No laches, therefore, can be imputed to him; and it would be a strange system of equity to deprive a man of his debt for not making a defense, at a time when no defense existed.

Decree reversed.

OSGOOD v. LEWIS.

[2 HARRIS & GILL, 495.]

AFTER VERDICT, THE ALLEGATIONS OF FRAUD AND DECEIT in the declaration are equivalent to the charge of an actual *scienter*.

AVERTMENT OF FRAUD AND DECEIT is immaterial where there is an express warranty.

WARRANTIES, ON THE SALES OF PERSONALTY, are of two kinds, express and implied.

EXPRESS WARRANTY, WHAT IS.—Any affirmation of the quality or condition of the thing sold, not uttered as matter of opinion or belief, made by the seller at the time of the sale, for the purpose of assuring the buyer of the truth of the fact affirmed, and inducing him to make the purchase, if so received and relied on by the purchaser, is an express warranty.

EXPRESS WARRANTY—HOW DETERMINED.—If the facts relied upon to prove an express warranty rest in parol, it is the province of the jury to determine whether such facts amount to an express warranty; but the court must determine whether an agreement in writing contains an express warranty or not.

IMPLIED WARRANTIES arise by operation of law, and they exist without any intention of the seller to create them. They are conclusions or inferences of law, pronounced by the court, upon facts admitted or proved before the jury.

IMPLIED WARRANTIES ARE OF TWO KINDS.—1. Those untinctured by actual fraud or deceit, as a warranty of title; 2. Those where fraud and deceit are their very essence; as where a seller, knowing of the unsoundness of an article, uses artifice to conceal such defect from the buyer.

A STATEMENT IN A BILL OF PARCELS FOR A QUANTITY OF OIL, that it was "winter-pressed sperm oil," is an express warranty by the vendor, that such oil was winter-pressed.

SELLER OF PERSONAL PROPERTY is not answerable for any defects in the quality or condition of the article sold, without an express warranty or fraud, but this rule is not universal, as where personalty is sold by sample, etc.

CASE. The plaintiffs purchased from the defendant a certain quantity of sperm oil, and received from him at the time the oil was delivered a bill of parcels, containing a statement that plaintiffs had purchased of him one hundred and fifteen casks of "winter-pressed sperm oil." The oil turned out to be of a very inferior quality. Verdict and judgment for defendant. Appeal from the Baltimore county court.

Williams, district attorney of United States, and Taney, for appellants.

R. Johnson, and Wirt, attorney-general of United States, contra.

By Court, DORSEY, J. Three questions have been argued in this cause. The first (presented by the first, second, and third exceptions), is whether the statement in the bill of parcels that the oil therein mentioned was winter-pressed, be a warranty of that fact? The second (arising on the fourth exception), is whether, upon the whole proof permitted to go to the jury, the county court erred in instructing them that there was no evidence that the oil was warranted winter-pressed? The third question (involved both in the third and fourth exceptions), is, can the appellants, having sued in case, and charged fraud and deceit, recover without proof of a scienter?

It was not denied in the argument that after verdict the allegation of fraud and deceit in the declaration is equivalent to the charge of an actual scienter; and it was admitted that if in this case there be an express warranty that the oil was winter-pressed, then the averment of fraud and deceit is immaterial, and need not be proved.

Warranties on the sales of personal property have usually been divided into two classes, express and implied. To create an express warranty, the word "warrant" need not be used, nor is any precise form of expression required. Any affirmation of the quality or condition of the thing sold (not uttered as matter of opinion or belief), made by the seller at the time of sale for the purpose of assuring the buyer of the truth of the fact affirmed, and inducing him to make the purchase; if so received and relied on by the purchaser, is an express warranty. And in cases of oral contracts on the existence of these necessary ingredients to such a warranty, it is the province of the

jury to decide upon considering all the circumstances attending the transaction. But of written contracts, the court are the expositors. Whether the instrument contain an express warranty or not, they must determine; not leaving the question to be inferred by a jury from a consideration of facts *aliunde*.

Implied warranties arise by implied operation of law; they exist without any intention of the seller to create them; and may properly be divided into two kinds. The one untinctured by actual fraud or deceit, as the warranty of title, warranty that provisions purchased for domestic use are wholesome; and the warranty in executory contracts, or where the purchaser had no opportunity of inspection, that the article contracted for shall be salable as such in the market. The other kind of implied warranties are those where fraud and deceit are of their very essence, without which they do not exist, as in cases where the seller of any article, knowing of its unsoundness, uses any disguise or artifice to conceal it, or represents it (whether in the way of expressing opinion or belief, or otherwise) to be exempt from such defect. Implied warranties are not conclusions or inferences of fact drawn by a jury; but they are the conclusions or inferences of law pronounced by the court upon facts admitted or proved before the jury. If the facts be controverted, the court hypothetically instruct the jury that if they find such and such facts, then there is an implied warranty, and their verdict must be given accordingly; but if they do not find those facts, then there is no implied warranty. Where an inquiry, therefore, is submitted to a jury whether an affirmation or statement made by the seller of the quality of an article sold be a warranty or not, the question would be, not whether it be an implied, but an express warranty? Had the court below permitted this case to go to the jury to determine whether, upon the whole testimony offered, the oil was winter-pressed oil, the question of express warranty only could have been the subject of their inquiry. The attempt, therefore, by the appellee's counsel to sustain the opinion of the county court on the ground that the present action depends on an implied warranty, if these positions be correct, can not avail them.

In support of the doctrine likewise insisted on, that conceding this to be an implied warranty, on which an action on the case could be sustained, without any allegation of fraud, yet that fraud, being charged, must be proved; no case of acknowledged authority has been produced. The passages relied on to establish it in Selwyn's *Nisi Prius*, p. 482-3, tit. Deceit, are

mere statements of the principles decided in *Dale's case*, Cro. Eliz. 44; *Springwell v. Allen*, Alleyn, 91,¹ and *Chandelor v. Lopus*, Cro. Jac. 4. The only point adjudged in the two former of these cases is that he who sells a chattel without title is not answerable to the purchaser (from whom the property is recovered by the rightful owner), unless he made an express warranty, or knew of the defect of his title. And the only point settled by the last case, except that, in pleading, affirmation of a fact does not mean a warranty thereof, is that if the seller of a horse, knowing him to be unsound, affirms to the buyer that he is sound; or if the owner of a stone of no real value, knowing it to be such, sell it to a person unskilled in such articles as a diamond of great value, and affirm it so to be; no action lies against him by the purchaser whom he has defrauded; and that it is the same thing whether he knew his affirmations to be false, or believed them to be true. It is unnecessary to say that these decisions are at war with the settled axioms of the law as recognized in all modern cases and writers on the subject. In an action on the case, upon an express warranty, fraud and deceit, though alleged, need not be proved, because the allegation is immaterial, the action being sustainable without it. The same reason will produce the same consequence in all actions on the case on implied warranties, where the scienter is not an essential ingredient of the right of action. This view of the subject accords with that found in Long on Sales, 120, where, in treating of warranties in sales of personal property, it is stated "some warranties are implied by law without any particular stipulation between the parties. Thus the seller is always understood to undertake that the commodity he sells is his own; and if it prove otherwise, an action on the case in the nature of deceit lies against him to exact damages for this deceit. In contracts for provisions, it is always implied that they are wholesome, and if they be not, the same remedy may be had." Yet in either of those cases the seller is liable, though ignorant of the defect. But if sued, as directed, "in nature of deceit," where the scienter, or fraud and deceit, are always alleged, no recovery can be had, according to the doctrine contended for, without proof of actual fraud. In such cases the fraud and deceit are intendments of law, not matters of fact necessary to be proved. As was justly observed by Chief Justice Anderson, who dissented from the other judges in *Dale's case*: "It shall be intended that he that sold had knowledge

1. *Springwell v. Allen*, Alleyn, 91.

whether they were his goods or not." It hence follows that the opinion of the county court can not be supported on the principle urged in the argument of the third question.

Whether the statement in the bill of parcels, that the oil was "winter-pressed," be *per se* a warranty of that fact, is a question of more difficulty. In oral contracts, much of the colloquium was never intended or understood by the parties to be essential component parts of the contract. But in written agreements nothing is inserted which is immaterial; no fact stated which is not presumed to be relied on by the parties, and for the truth of which the one does not bind himself to the other. Upon this principle it is, that mere recitals in deeds have been held to be covenants; upon this ground must rest the decision that the action of covenant could be supported in *Craemer v. Bradshaw*, 10 Johns. 484. There the plaintiff declared on a bill of sale, by which the defendant, in consideration of one hundred and seventy-five dollars, bargained and sold to the plaintiff "a negro woman slave, named Sarah, aged about thirty years, being of sound mind and limb, free from all disease." And the defendant, in due form, in the covenanting part of the instrument (omitting everything as to age or soundness), covenanted only to warrant and defend the slave, so sold to the plaintiff, against the defendant and all other persons. The alleged breach was, that the slave was unsound, and affected with divers diseases, etc. *Per curiam*, the words in the bill of sale, "being of sound mind and limb, and free from all diseases," are an averment of a fact, and import an agreement to that effect. The words were not used as a mere description of the slave; they amount to an express, not an implied warranty; to a warranty of the soundness of the slave. The plaintiff is therefore entitled to judgment.

If the bill of parcels be considered as the written contract between the parties, the statement therein, that the oil was "winter-pressed," could not be considered as mere matter of description; or of opinion or belief of the seller; but as the averment of a material fact, of which he has taken to himself the knowledge, and the existence of which he warrants. This court, however, has never decided that the bill of parcels is the written contract, nor is it designed at this time to express any opinion upon that subject; but in *Batturs v. Sellers and Patterson*, 5 Harr. & John. 117 [9 Am. Dec. 492], and 6 Harr. & John. 249, this court did decide that the bill of parcels in that case was written evidence of the contract; and could not be added

to, or varied by, oral testimony. It follows as a necessary consequence that, if the bill of parcels be "the written evidence of the contract," the terms and expressions thereof must receive the same construction that would be given them if expounded from the written agreement itself, where calling it "winter-pressed oil," would be a warranty that it was such.

Upon English authorities, independently of any decisions in this state, it would appear that a statement in a bill of parcels, or any similar instrument, of the quality of an article sold, is a warranty thereof. In *Yates v. Pym*, 6 Taunt. 446, an action upon a sale note (an instrument of no greater solemnity or obligation than a bill of parcels) "of fifty-eight bales of prime singed bacon," on account of a taint in some of it, Justice Heath decided "that the contract amounted to a warranty that it was prime singed bacon, and being in writing, could not be added to by parol evidence." And on motion to set aside the verdict, the opinion of the learned judge was sustained by the court of common pleas. In *Shepherd v. Kain*, 5 Barn. & Ald. 240, an action on the case for breach of warranty, the only evidence of which was the advertisement of a vessel as "copper-fastened," yet sold with all faults, upon proof that she was only partially copper-fastened, Best, J., determined that the plaintiff was entitled to recover; and this opinion was affirmed in the court of king's bench. These are cases in which was recognized an express warranty of quality, from the mere statement thereof in the sale note or advertisement.

As establishing a contrary doctrine, has been cited for the appellee, the case of *Jendwine v. Slade*, a *nisi prius* decision of Lord Kenyon, in 2 Esp. 572. The action was brought to recover damages on the sale of two pictures, sold under a catalogue, wherein the names of the artists, who had been dead some centuries, were placed opposite to the pictures; the ground of action being, that the pictures were not the works of those artists, of which, it was alleged, the catalogue was a warranty. Lord Kenyon said: "It was impossible to make this the case of a warranty; the pictures were the works of artists some centuries back; and there being no way of tracing the picture itself, it could only be matter of opinion whether the picture in question was the work of the artist whose name it bore or not. What, then, does the catalogue import? That in the opinion of the seller the picture is the work of the artist, whose name he has affixed to it." Looking only to the facts in the case of *Jendwine v. Slade*, and the decision of the judge

upon them, it might perhaps be considered as entitled to all the weight in favor of the appellee, which his counsel have ascribed to it. But when the explanation and grounds of the opinion, as given by the judge himself, are adverted to, their only application to the case at bar is to recognize the plaintiff's right to recover. He states that it is impossible to make putting the name of the artist in the catalogue opposite the picture, a warranty, because it was the work of an artist some centuries back; and there being no way of tracing the picture itself, it could only be matter of opinion whether the picture in question was the work of an artist to whom it was imputed, or not. Suppose, instead of an ancient, it had been a picture of recent execution; what then, by necessary inference, would have been the opinion of the learned judge? Why, as there did exist a mode "of tracing the picture itself," therefore, by placing the name of the artist in the catalogue, opposite the picture, is not a mere expression of the opinion of the seller, but a warranty of the fact. The oil in controversy is no article of antiquity; it was manufactured but a short time before in Nantucket, where Lewis resided, and whence he brought it to Baltimore, and sold it as his own. Without great inconsistency and abandonment of his own reasoning, Lord Kenyon (who decided *Jendwine v. Slade*) could not do otherwise than determine that the statement in the bill of parcels, that the oil was "winter-pressed," was a warranty thereof.

As a general proposition, it is true that in sales of personal property the seller is not answerable for any defects in the quality or condition of the article sold, without an express warranty or fraud. But the universality of this rule is qualified by many exceptions, much more inconsistent with it than the principle on which the appellants here rest their right to recover. As if a manufacturer contract to furnish goods at a stipulated (even though it be reduced) price, there is an implied warranty that the goods delivered be of merchantable quality. To this effect is the case of *Laing v. Fidgeon*, 6 Taunt. 108. So also if the buyer had no opportunity of ascertaining, by inspection, the quality of the article, there is an implied warranty that it be salable in the market under the denomination by which it was sold. Such are the cases of *Gardiner v. Gray*, 4 Campb. 144, and *Bridge v. Wain*, 1 Stark. 504. It is not sufficient that the article delivered, abstractly bear the name of that contracted for; it must do more, there is an implied warranty, that it be of that quality which a commodity of that name must possess to be

salable in the market. Nay, such is the disposition of courts of justice to ingraft exceptions upon this general rule of law, that in *Gray and another v. Cox and others*, in 4 Barn. & Cres. 108, Abbott, C. J., decided, "that the defendants having sold the copper to be applied to a specific purpose, and having received for it the market price of the day, must, in law, be considered as warranting it to be reasonably fit for that purpose." And the same doctrine was previously avowed, in *Bluet v. Osborne and another*, 1 Stark. 384, by Lord Ellenborough, who stated that "a person who sells, impliedly, warrants that the thing sold shall answer the purpose for which it was sold."

The cases of *Seixas v. Woods*, 2 Cai. 48 [2 Am. Dec. 215], and *Swell v. Colgate*, 20 Johns. 196 [11 Am. Dec. 266], have been mainly relied on for the appellee, and it must be admitted that upon the principles on which they are professedly decided, it is not possible to reconcile them with the decisions in England, which have been referred to. Regarding the facts only of these New York cases, it might, perhaps, be urged (but whether upon sustainable ground or not, we mean to intimate no opinion), that they differ from the case at bar in this; here the statement relied on as a warranty, is of the quality of the thing sold, viz., that it was "winter-pressed;" there the question was, whether the selling an article as braziletto or barilla, creates an implied warranty, that it be that for which it is sold. The court there, however, have placed their opinions upon no such distinction; but have broadly determined that the showing by the seller to the purchaser, of the invoice representing the quality, the advertisement of sale, and bill of parcels delivered to the buyer, all representing the same fact, are no evidence of a warranty (either express or implied) of the quality of the articles sold. Justices Thompson and Kent, by whom *Seixas v. Woods* was decided (Lewis, C. J., having dissented), appear mainly to found their opinion upon the two old cases of *Chandelor v. Lopus*, and *Springwell v. Allen*, to the former of which they are made by the reporter to give an entirely new version. They state the decision of the court to have been, that an action of trespass would not lie, for selling a jewel, affirming it to be a bezar stone, when in truth it was not, unless the defendant knew it not to be a bezar stone, or had warranted it to be such. The court in that case made no such decision. They held the declaration to be ill, "for as much as no warranty is alleged" (the narr. having only stated that the goldsmith "affirmed to Lopus that the stone was a bezar stone"). And so far from intimating an opinion that

the action could have been sustained, if the goldsmith had known the stone not to be a bezar stone, they expressly state, that "although he knew it to be no bezar stone, it is not material; for every one in selling his wares, will affirm that his wares are good, or the horse which he sells is sound; yet if he does not warrant them to be so, it is no cause of action." As to *Springwell v. Allen*, it professes to settle precisely the same question which arose in *Dale's case*; that no action would lie against a man selling the horse of another, which he believed to be his own. Many other cases are relied on, in *Seixas v. Woods*, some of which are applicable to sales of real property only, and in none of them can aught be found further sustaining the opinion there pronounced, or more strongly militating against that now given, than the general rule before laid down, that in sales of personal property no warranty of quality is implied.

The case of *Swell v. Colgate*, 20 Johns. 196 [11 Am. Dec. 266], is, in fact, a mere reiteration of what was decided in *Seixas v. Woods*. The weight of the authority of *Seixas v. Woods* (and consequently of *Swell v. Colgate*), is, however, somewhat shaken by that distinguished jurist, the late Chancellor Kent, by whom it was decided. In his commentaries, vol. 2, p. 274, 275, after ample time for the most thorough investigation and mature deliberation upon the subject, when treating "of the implied warranty of the articles sold," he says: "In *Seixas v. Woods* the rule was examined and declared to be, that if there was no express warranty by the seller, or fraud on his part, the buyer, who examines the article himself, must abide by all losses arising from latent defects equally unknown to both parties; and the same rule was again declared in *Swell v. Colgate*. There is no doubt of the general rule of law as laid down in *Seixas v. Woods*, and the only doubt is whether it was well applied in that case, where there was a description in writing of the article by the vendor, which proved not to be correct, and from which a warranty might have been inferred." But yield to those cases (what we think them by no means entitled to) the full effect of establishing the universality of the rule, without an exception, that nothing but an express warranty or fraud will enable a purchaser to obtain an indemnity for a defect of quality in the thing purchased, the case before us stands unaffected by it. The statement in the bill of parcels that the oil was "winter-pressed" is regarded as an express warranty; and under the decisions in *Batturs v. Sellers & Patterson*, 6 Harr. & John. 249 [9 Am. Dec. 492], the court, and

not the jury, is the tribunal so to declare it. The opinions of the county court, therefore, in none of the exceptions, can be sustained.

But suppose the bill of parcels is not to be construed in the same manner that a written agreement between the parties should be, and is to be regarded as a mere receipt, and that, notwithstanding the case of *Ballurs v. Sellers & Patterson*, 6 Harr. & John. 249, parol evidence might be offered to prove the contract, is it possible that a jury could attach less weight to the written statement in the bill of parcels than they would do to Lewis' verbal affirmation of the same fact; which affirmation is an express warranty, if so intended to be, of which intention, in oral contracts, the jury only are competent to judge.

Adverting, then, to some of the leading facts in proof by the appellants: that they, for the first time, were about to become dealers in sperm oil; that "winter-pressed" was of nearly double the value of summer-pressed oil; that the price paid was that of winter-pressed oil; that such was the temperature of the weather at the time of sale that the most experienced dealers in the article could not distinguish the one from the other but by the aid of chemical experiments by men of science; that in the bill of parcels it was denominated "winter-pressed" oil; and the appellee had admitted that he had sold it for the best winter-pressed oil, and that it was not what he had sold it for—can the instruction given to the jury (as stated in the fourth exception), that there was no evidence of a warranty, be for one moment sustained? Would it have been an unreasonable inference from the facts to be drawn by the jury that in the verbal contract the appellants required and received a warranty of quality? Upon what other ground can its insertion in the bill of parcels be accounted for?

It matters not that this testimony be contradicted, its force impaired by the proof adduced on the part of the appellee; in such circumstances it is the jury, not the court, who are to decide.

Dissenting from the opinions of the county court, on all the exceptions, let their

Judgment be reversed, and a *procedendo* awarded.

WARRANTY, when implied in sale of chattels: *Emerson v. Brigham*, 6 Am. Dec. 113, note; see note to *Bailey v. Nickols*, 1 Id. 84; *Seimas v. Woods*, 2 Id. 215, note 220.

CASES
IN THE
HIGH COURT OF CHANCERY
OF
MARYLAND.

JONES *v.* JONES.

[1 BLAND'S CH. 443.]

LAND WAS NOT LIABLE TO SALE ON EXECUTION at common law for the debt of a private creditor.

FOR A DEBT DUE THE STATE OR THE KING, land could always be taken in execution.

KING'S DEBT IS PREFERRED in execution, and in the administration of decedents' estates to that of a citizen.

KING'S PREFERENCE DEVOLVED UPON THE STATE at the revolution.

STATE HAS A LIEN ON THE LANDS of its judgment-debtor, from the commencement of the action under our statute.

DEBTOR'S WHOLE REAL ESTATE IS LIABLE IN THIS STATE by statute, to be taken in execution.

JUDGMENT LIEN attaches on land at the date of the judgment.

JUDGMENT LIEN EXISTS AFTER THE DEATH of a party has abated the cause, but execution can not issue until the judgment has been revived.

FIERI FACIAS BOUND THE DEFENDANT'S GOODS from its *teste* at common law.

UNDER THE STATUTE OF FRAUDS, FIERI FACIAS binds the defendant's goods only from its delivery to the sheriff as respects purchasers and creditors.

AS TO THE PARTY HIMSELF, NOTWITHSTANDING THE STATUTE, judgment and *feri facias* still relate to the first day of the term, or at least to the *teste* of the writ.

FIERI FACIAS TESTED IN THE DEFENDANT'S LIFE-TIME may be executed after his death.

NO DISTINCTION IS MADE BETWEEN REALTY AND PERSONALTY under the statute subjecting land to sale on execution, as it has been construed here, so far as the effect of an execution tested in the debtor's life-time is concerned; so that the debtor's land may be sold after his death under a *feri facias* levied or tested before.

LAND IS CHANGED INTO PERSONALTY BY AN EXECUTION SALE, and, the debtor being deceased, the surplus goes to his personal representative,

and not to his heir. So held by the chancellor, but the court of appeals held otherwise.

MUTATION OF REALTY INTO PERSONALTY BY JUDICIAL PROCEEDINGS discussed by the chancellor.

MONEY IN THE HANDS OF A SHERIFF or a third person can not be taken under a *feri facias*.

SHERIFF HOLDING MONEY MADE ON EXECUTION FROM ANOTHER COURT can not be directed by this court to bring it in for distribution.

CREDITOR'S BILL, by Hiram and Elizabeth Jones, against the infant heirs of Jesse Jones, deceased, and Richard Spencer and Edward Brown. From the allegations of the bill, which were admitted by the answers severally put in by the defendants, it appeared that Jesse Jones, deceased, was indebted to the plaintiff, Hiram Jones, on a certain single bill, and that the said Hiram was also the owner and holder of two judgments recovered against the deceased, in his life-time, by the defendant, Spencer, and assigned to the said Hiram; that the deceased was also indebted to the plaintiff, Elizabeth Jones, in a certain sum on bond; that the deceased died intestate in August, 1825, seised of about twenty acres of land, and leaving a widow and the two infant defendants, his heirs at law; that there had been no administration on his estate, and all, or nearly all, his personalty had been sold on executions levied in his life-time; that one Thomas Dawson had recovered a judgment against the deceased on March 17, 1823, in his life-time, in the Kent county court, which was affirmed on appeal by the court of appeals; that a *feri facias* was issued thereon from the court of appeals on July 1, 1824, which was on August 16, 1824, levied by the defendant Brown, as sheriff, on certain land of the deceased; that the deceased, before his death, made a partial payment to the sheriff; that after his death the land was sold under said execution September 3, 1825, subject to the dower of the widow of the late David Jones, and also of the widow of Jesse Jones, deceased; that the amount of Dawson's judgment, together with costs, expenses, etc., was paid out of the proceeds, leaving a balance of one thousand four hundred and fifty-one dollars and thirty-eight cents in the defendant Brown's hands. The bill prayed that the land of which Jesse Jones died seised should be sold, and the proceeds, together with the money in the defendant Brown's hands, paid over to a trustee, appointed by the court, to be applied to the plaintiffs' claims, and such other debts as might be found due from the intestate, etc.

BLAND, Chancellor. This case standing ready for hearing without opposition from the defendants, the solicitor of the

plaintiffs was fully heard, and the proceedings read and considered.

The peculiar nature of this case seems to require a more than usually attentive consideration. Putting aside so much of it as relates to the small parcel of land of which the intestate died seised, about which there can be no difficulty, this is the case of a creditor's bill, in which it appears that the real estate of the debtor had been taken in execution during his life-time, and sold after his death, leaving a balance, which even yet remains in the hands of the sheriff whose official term must have since expired, and who has been brought here as a defendant, unassociated with any personal representative of the intestate. These circumstances present a case in which it becomes necessary to determine the extent of the power of the sheriff to follow out, after the death of the defendant, the authority conferred on him by the *fiery facias* he had previously levied; and if it should appear that his authority to proceed with the execution was well founded, to ascertain whether the surplus of the proceeds of the sale so made is to be considered as real assets to be taken from the hands of the heirs, or to be accounted for as personal assets by an administrator of the intestate; and also, to inquire whether there is any mode in which this court, by any exercise of power within its own legitimate sphere, can compel an officer of another and a superior tribunal to place a fund, now in his hands by their authority, under the direction of this court, to be disposed of as prayed by these plaintiffs.

It was a well-settled principle of the common law of England that the real estate of a debtor could not be taken in execution at the suit of a citizen creditor, and sold for the satisfaction of the debt. This rule was considered as a fair and necessary result from the nature of the feudal tenures according to which all the lands of that country were held. And as the most liberal species of those tenures was expressly declared to be that by which all the lands of Maryland should be held, it followed that real estate could be no further subject to be taken in execution here than the same kind of estate was liable in England: Charter of Maryland, sec. 5 and 18; Gilb. Exch. 89. In the case of the king, however, an execution always issued against the lands as well as the goods of a public debtor, because the debtor was considered as being, not only bound in person, but as a feudatory, who held mediately or immediately from the king; and, therefore, holding what he had from the king, he was from thence to satisfy what he owed to the king:

Gillb. Exec. 3. As a consequence of this liability, and for the public benefit, if a judgment was obtained against a public debtor by the king, he thereby acquired a lien upon the real estate of such debtor, which took effect, not merely from the date of the judgment, but by relation from the commencement of the suit to the exclusion of all subsequent incumbrances: Pow. Mort. by Coven. c. 23, sec. 9; Gillb. Exch. 93; *Rorke v. Dayrell*, 4 T. R. 410; Sug. Pow. 184. In England the king's debt is preferred in execution and in the administration of a deceased's estate to that of a citizen, which right of preference was in Maryland extended to the lord proprietary: 1650, c. 28. After our revolution it was held to have devolved, according to the principles of the common law, upon the state: *State v. Rogers*, 2 H. & McH. 198; *Hollingsworth v. Patten*, 3 Id. 125; *Murray v. Ridley*, 3 Id. 171. And it has been expressly declared that all lands and tenements belonging to any public debtor, after the commencement of suit against him, shall be liable to execution in whatever hands or possession they may be found: March, 1778, c. 9, sec. 6; November, 1787, c. 40. By which legislative enactment, the state's lien, as in England, relates, not merely to the date of the judgment, but to the commencement of the action. Whence it follows that the liability of the real estate of a debtor to the state to be taken in execution, and the lien of the state incident to such liability, are founded upon the common law and the acts of assembly passed in express relation to debts due to the state.

But the general rule of the common law in regard to the liability of real estate to be taken in execution as between party and party, was modified by a statute passed in the year 1285, which made such estates liable to be partially taken in execution: 13 Ed. 1, c. 18. This statute, which gave the writ of *elegit*, enlarged the remedy of the creditor by declaring that when a debt was recovered or damages adjudged, it should be in the election of the plaintiff to have a *feri facias*, or to have all the debtor's chattels and the one half of his lands delivered to him until the debt was levied to a reasonable extent: 2 Inst. 394; which gave the election immediately that the debt was recovered, and therefore the whole land was held to be bound from the day of the rendition of the judgment, and those concerned, it was presumed, might easily ascertain from the record by what judgments the lands of the debtor were thus bound: Gillb. Exec. 37. But as some inconvenience arose, because, according to the common law, judgments took effect by relation

from the first day of the term, it was in the year 1676 declared by the statute of frauds that the day on which judgments were rendered should be entered upon the record, and that purchasers should be charged from such time only, and not from the first day of the term whereof the judgment was entered: 29 Carl. 2, c. 3, secs. 14 and 15. This, then, was the nature and extent of the judicial lien as between party and party, with which the real estate of a debtor might become bound in Maryland as well as in England. And this judicial lien was afterwards mainly fortified and enlarged by a statute passed in the year 1732 (5 Geo. 2, c. 7), applicable only to the then colonies of Great Britain, and received as law in Maryland, which subjected the whole of a debtor's real estate to be taken in execution and sold for the payment of his debts.

Whence it appears that the lien arising from the judgments of Dawson and Spencer, at their respective dates, fastened upon the real estate of Jesse Jones, adhered to it after his death, and would have followed it into whosoever hands it might have passed until they were satisfied, or the right to sue out an execution upon them had become entirely barred. But a judicial lien of this kind may exist after the case has abated by the death of a party, and yet no execution could be immediately issued against the lands upon which it attached, after the death of the party, until the judgment had been regularly revived. And this was in fact the situation of Spencer's judgments. Hence, although it will be necessary, in the further consideration of this case, to recollect the nature and extent of the judicial lien with which the real estate of Jesse Jones had been incumbered during his life-time, yet the authority of the sheriff to make the sale he did, after the death of Jones, under the *fieri facias* issued on Dawson's judgment, must be deduced from other principles of law.

By the common law, a *fieri facias* bound the goods of the defendant from its *teste*, so that any sale made by him after that time was void, because it was thought that if it were not so, every execution might be avoided by a sale; and it was presumed that the sheriff would execute such writs immediately, and that there would be thereby such notice in the neighborhood as to prevent any deception or fraud. But this notion of a retrospective lien going back to the *teste* of the writ was abused; writs were taken out one under another, so as to obtain liens upon the goods of debtors without delivering them to the sheriff, by which means their sales and all commerce were made uncertain.

To prevent which, it was declared by the statute of frauds that the goods should be bound only from the actual delivery of the writ to the sheriff; by which the old law was, in effect, restored, which supposed the writ to be delivered to the sheriff immediately from the *teste*: Gilb. Exec. 14.

The mere seizure under the *feri facias* does not absolutely or totally divest the defendant of all property in the goods taken; but the sheriff thereby acquires only a qualified property in them, commensurate, however, in all respects to the performance of the duties assigned him by the writ. He is responsible for the safety of the property, and therefore may have an action against any wrong-doer who attempts to injure it, or to take it from him. Yet, if before a sale the defendant pays to the sheriff the whole debt and costs, he is bound to redeliver the property so taken in execution. The statute of frauds was intended for the benefit of purchasers and creditors only; therefore, still, as relates to the party himself, the judgment and *feri facias* relate to the first day of the term, or at least to the *teste* of the writ; so that if it be tested in the defendant's life-time it may be taken out and executed after his death: Tidd, Pra. 915; Pow. Mort. by Coven. 275, 280, 515; *Odes v. Woodward*, 2 Ld. Raym. 850; *Bragner v. Langmead*, 7 T. R. 20; *Docura v. Henry*, 4 H. & McH. 480. And so, on the other hand, if the plaintiff dies, after a *feri facias* has been sued out, it may nevertheless be executed. And as the writ commands the sheriff to bring the money into court, it is his duty to do so accordingly, so that it may be there deposited to be paid, if the plaintiff be dead, to his executor or administrator when he shall appear; or, if the defendant be dead, that the surplus, if any, may be paid to his legal representatives when they may come prepared to show their right to it: Tidd, Pra. 915. Hence it is clear, that this positive command of the writ, virtually and necessarily intercepts the property in its course and evicts it from the hands of the executor or administrator of the deceased defendant, who died after it bore *teste*: *Wilbraham v. Snow*, 2 Saund. 47; *Oades v. Woodward*, 7 Mod. 94; *Dr. Needham's Case*, 12 Id. 5; *Waghorne v. Langmead*, 1 Bos. & Pul. 572; *Robinson v. Tnge*, 3 P. Wms. 400.

These are the well-settled principles of law in relation to the personal property of the defendant against whom the *feri facias* issued. But, as in England real estate cannot be taken in execution under a *feri facias*, there are no English adjudications in relation to a case like this, where the *feri facias* had been levied

upon the real estate of the debtor. But the statute, 5 Geo. II, c. 7, which subjected lands to be sold for the payment of debts, has been so interpreted, and carried into effect here, as to make no distinction whatever between the debtor's real and personal estate, so far as it may be affected by any execution bearing *teste* in his life-time: *Barney v. Patterson*, 6 H. & J. 182; *Davidson v. Beatty*, 3 H. & McH. 616. And, therefore, by analogy to the principles of the English law, applicable to an execution against the personalty, it has been held in this and in other states, in which this English statute has been received, that by a *fiery facias* which bears *teste* or has been levied, during the life-time of the defendant, his real estate may be intercepted in its descent and evicted from the hands of his heir; who, if he happens to have obtained actual possession of the estate after the death of his ancestor, will be treated merely as a terre-tenant, whose interest cannot be allowed in any manner to retard or turn aside the execution which had been thus, in fact, or by relation, sued out in the life-time of the debtor: *Sir William Harbert's Case*, 3 Co. 12; *Winstead v. Winstead*, 1 Hayw. 245; *Beatty v. Chapline*, 2 H. & J. 19. Whence it clearly follows that the sale of Jesse Jones' lands, made after his death, under the *fiery facias* issued on Dawson's judgment was, in all respects, regular and lawful.

The next inquiry is, how far the judicial proceedings, to which the real estate of Jesse Jones has been subjected, have produced a change in its character, or converted it from realty into personalty. And if it has been so converted, then it will become necessary to ascertain the exact point of time at which that very important change was definitively effected.

The writ of *fiery facias* commands the sheriff to have the money in court, there publicly to pay the party. He may himself pay the plaintiff, but if he does so it will be at his peril; for he is only perfectly safe in bringing the money into court, according to the express command of the writ. The sheriff can not deliver the property taken in execution to the plaintiff in satisfaction of his claim; he must sell it and bring in the money. The property of the defendant is to be taken and converted by a sale into money; and hence, if the judgment be afterwards reversed by a writ of error, the defendant shall not be restored to the thing in specie, but the money for which it was sold; for the *fiery facias* gave the sheriff authority to levy the money of the goods, so that he was obliged to turn the goods of the defendant into money; and therefore, the restitution must be of what

the execution had taken from him, which was money, and not the thing itself, for then nobody would buy: Gilb. Exec. 16 and 20. These are the well-settled principles of the common law in relation to personal property taken in execution under a *fiery facias*; and the statute having made lands liable to the payment of debts, and subject to the like remedies and process as personal estate, it follows, upon the same principles, that where lands have been sold under a *fiery facias* they must be considered as having been converted into personalty. So, if the judgment should be afterwards reversed, the title of the purchaser can not be affected by it; for otherwise there would be no security in purchasing at sheriff's sale: *Davidson v. Beatty*, 3 H. & Mc. 616; *Barney v. Patterson*, 6 H. & J. 204.

Hence, the surplus of the proceeds of a sale of lands, as well as of goods remaining in the hands of the sheriff after a sale made by him under a *fiery facias*, can only be viewed as the surplus of that money which he was commanded by the writ to make and bring into court. And hence such surplus must be regarded in all respects as a portion of the personalty of the defendant.

From a case reported as having been considered and determined by the general court, it appears that Philemon C. Blake had given two bonds to the state for the performance of his official duties as sheriff, on which the state sued, and having obtained judgments on each of them, issued a *fiery facias* on the first judgment, and had it levied upon his real estate, which was sold for a sufficiency to satisfy the first judgment, leaving a surplus of eighty pounds, which was then in the hands of the defendant. The only question was, whether the state was entitled to a preference from the commencement of the second suit over any judgments obtained against Blake after that time. As to which it was held, that upon the state's obtaining a judgment against its debtor, the act of assembly (March, 1778, ch. 9, sec. 6) gave it a lien upon his lands by relation from the commencement of the suit, into whosoever hands they might come; and, therefore, that the state was entitled to have its second judgment, satisfied out of the surplus, in preference to any judgment rendered after the commencement of its second suit: *Davidson v. Clayland*, 1 H. & J. 546.

The court is reported to have said, in delivering the reasons of their judgment, that "the surplus of the money arising from the sale of the said Blake's land, after satisfying the first judgment of the state, remaining in the hands of the defendant, is

to be considered as land, and subject to the attachment of the state, issued on the second judgment, in preference to the claim of the plaintiff:" *Davidson v. Clayland*, 1 H. & J. 550.

But the only question was, whether the lien of the state continued to adhere to the proceeds of the sale. Whether they were to be considered as realty or personalty was, therefore, a matter of no kind of importance, and so it appears from the general tenor of the arguments of the counsel as well as of the opinion of the court. The question turned upon the construction of the act of assembly as to the continuance of the state's lien, and nothing more. The point, whether by a sale under a *feri facias* the real estate had been converted into money or personalty, or, whether the surplus was to be regarded as real or personal estate, could not have arisen, because either alternative might have been assumed; and upon the principles laid down, the decision must have been the same; and, therefore, this point could not have been in the mind of the court, and decided upon in that case. And besides, this act of assembly (March, 1778, c. 9, sec. 7) does in itself most manifestly regard the surplus as money or personalty; for it declares that the sheriff shall sell the lands to the highest bidder, and shall retain sufficient in his hands to pay the debt and all costs, his own fees included, returning the overplus, if any, to the debtor; that is, he shall, from the money into which the lands have been converted, pay the debt, returning the overplus of that money to the debtor.

There is, therefore, nothing to be found in that case, when carefully examined, which can be considered as at all at variance with the general and well-settled principles of the common law, according to which, in all cases where personal property has been legally sold under a *feri facias*, it is held to be made into money, or, if it be realty, that it is by such sale converted into money or personalty.

It frequently occurs in this court on creditors' bills, where the originally suing creditor claims by simple contract, and the land has been sold to satisfy his claim, that there afterwards come in mortgagees or judgment-creditors; in which case, the sale stands and is deemed valid, and their liens are considered as following and binding the proceeds of the sale, not because these proceeds are held to be realty, but because no act of any other creditor, or of the court, can divest the mortgagee or judgment-creditor of his lien upon the lands without giving him a satisfaction, according to the priority of his lien, out of the proceeds of the sale of that land which had been so bound. If,

however, in a creditors' suit against the representatives of their deceased debtor, his lands are sold to pay his debts, leaving a surplus, or, if in a suit by a mortgagee against the heirs of the mortgagor the mortgaged lands are sold to pay the debt, leaving a surplus, in such cases the surplus is considered as a part of the proceeds of the real assets taken from the heir; therefore, must be paid to him, not to the executor or administrator of his ancestor, and, consequently, can only be taken from him to satisfy other claimants who may have an equity to be let in after the distribution, by a special application, under the creditors' bill, or in the suit by the mortgagee, upon the ground of the insufficiency of the personal estate of the deceased: Pow. Mort. by Coven. 983; *Bromley v. Goodere*, 1 Atk. 75; *Flanagan v. Flanagan*, cited 1 Bro. C. C. 500; *Banks v. Scott*, 5 Madd. 493; *Mackubin v. Brown* 1 Bland. Ch. 410; *Wright v. Rose*, 2 Sim. and Stu. 323; *Fenwick v. Laughlin*, 1 Bland. Ch. 474.

There are other modes of judicial proceeding by which real estate may be changed into personalty, or by which lands may be converted into money, or choses in action. This often occurs under the acts of assembly directing the course of descents; according to which, where the lands of an intestate are incapable of being divided among his heirs without loss, they may, on application to the proper court of law, be ordered to be sold, and the proceeds of the sale, or the bonds of the purchaser, divided among the heirs. But the exact point of time when the judicial proceeding, instituted for that purpose, had effected a change in the nature of the property, was considered as a most interesting question in its consequences to the relative rights of the parties. As to which it was held, after mature deliberation, that the mutation of the estate, from real to personal, may be determined to be complete when the commissioners' sale is ratified by the court, and the purchaser has complied with the terms of it by paying the money if the sale is for cash, or by giving bonds to the representatives if the sale is on a credit: *State v. Krebs*, 6 H. & J. 36.

According to this rule, the mutation, from realty to personalty, can only be finally consummated by a series of separate and distinct acts: 1. There must be a judgment or judicial authority given by the court to sell; 2. The commissioners, or agents employed to make the sale, must have reported to the court that they had, in pursuance of that authority, made a sale; 3. The court must have ratified the sale so made and reported; and lastly the purchaser must have either paid the purchase-money

or have given his bonds to secure the payment of it to the party entitled. When all these acts have been done, the judicial function of the court, in relation to the subject, has finally terminated; and the fund which had been submitted to its operation has been thereby changed from one kind of property into another; from real into personal estate.

With regard to the mutation of the estate, the rule in equity seems to be different; or, at least, it appears to have been held, that all four of those several acts are not essentially necessary to produce a conversion of the property from realty to personalty. For, where, on a bill in chancery to obtain a partition of the real estate of an intestate among his heirs, one of whom was then a *feme-covert*, on the lands being deemed incapable of division, a decree was passed, ordering them to be sold; and the trustee appointed for that purpose, reported that he had sold them accordingly; which sale was finally ratified by the court. After which, and before the purchase-money had been paid, and before any order had been passed by the court, directing the manner in which the purchase-money should be distributed, the *feme-covert* died; and then her husband died. Upon which the interest of the *feme-covert*, at the time of her death, was viewed in the nature of an equitable chose in action; her individual legal estate in the realty having been changed by the decree, the sale, and the ratification thereof, into a floating undivided interest of that kind.

Hence it appears, that, in equity, the mutation is effected by the mere preliminary operations of the court, or by those judicial proceedings which are always had as preparatory only to that partition of the property among the parties which is the sole object of the suit. And it was further held, that although the husband was a party to the suit, yet he could not be considered as having, by those proceedings alone, reduced this interest of his wife's into possession; because the proceeding only directs a sale of the property, and the proceeds to be brought into court. It professes not to ascertain the rights of the respective claimants; it makes no distribution, it awards no payment, either immediately or contingently, to husband and wife, or either of them; no such decree has passed as is equivalent to a judgment at law, which would vest the chose of the wife absolutely in the surviving husband; nor has any order been passed by the court, directing the proceeds to be paid to the husband and wife, or to the husband alone. And, therefore, although the real estate of the wife had been converted into an interest in

the nature of an equitable chose in action, that is, into mere personal property of that description; yet, as the husband had not reduced it into possession during his life-time, it passed to the personal representatives of the late *feme-covert*, not to those of her deceased husband: *Leadenham v. Nicholson*, 1 H. & G. 275; *Hammond v. Steir*, 2 G. & J. 81; *Cary v. Taylor*, 2 Vern. 302.

A married woman who is entitled to an undivided part of a real estate can not be in any way deprived of it without her express consent, which, by the common law, can only be obtained by a fine, or, under the acts of assembly, by her privy examination and acknowledgment of a deed conveying it to another. From necessity, and for the purpose of effecting a partition of a real estate which is incapable of division without loss, it may be sold and converted into personalty. But a change of the nature of property, in order to attain a particular object, should not divest the owner of his right to it to any extent whatever. The conversion of a real estate into personalty for the purpose of thereby awarding to a *feme-covert*, more fully and exactly than could otherwise be done, her due share of it, ought not to be allowed to operate so as to impair her right to it, or to lessen her absolute control over it in any way whatever. When a married woman petitions for, or consents to have a partition made, of a real estate in which she is entitled to an undivided interest, and acquiesces in a sale of it for the purpose of making a just division of its value, because of its being difficult or impracticable to make a correct partition of it in kind without mutual loss, she ought not to be considered as having thereby virtually agreed to have her own absolute right to her share transferred to another, or in any way lessened or impaired. For if that were the effect of the judicial proceeding, then the inevitable consequences of a suit for a partition in all such cases would be that the suit itself would operate as a partial or total extinguishment of the rights and interest of the *feme-covert*. Because, if by a sale for the purpose of effecting a partition, the wife's share is thereby converted into personalty, which her husband may, at pleasure and without her consent, reduce into possession, the result will be that she may thus be divested of her real estate without her express consent; and even if the husband were allowed so to take the wife's share as personalty, subject to what is called the wife's equity, then she could only have a portion of it settled upon her, whereas the whole of the proceeds of sale awarded to her are,

in truth, but the substitute for her realty, and therefore, to do her justice, the whole should be settled upon her as land, unless she should expressly consent that the proceeds of sale should be otherwise disposed of: *Spurrier v. Spurrier*, *post*, 000¹; *Iglehart v. Armiger*, *post*, 000².

It may well be doubted whether it is within the constitutional competency of either the legislative or judicial department of our government to pass any law, or to do any act, which shall result in thus divesting any one of his property, or impairing his rights without his express consent. It is a general rule of law, from which no court of justice should permit itself to deviate, that no citizen can in any way be deprived of his property without his consent, or otherwise than as a punishment, or as a means of compelling him to pay his debts, and comply with his contracts. If, being competent to consent, he refuses to allow his property to be applied to a public purpose, it can not, even in that case, be taken from him without an adequate compensation. But if the owner be incompetent to contract, or to manage his own affairs, a court of justice never undertakes even to alter the nature of his property from realty to personalty, or the reverse, except from necessity and for his obvious advantage: 1 Madd. Chan. 339; High. Lun. 60, 69. So, too, although this court has been expressly authorized by various acts of assembly, for the benefit of an infant, or person *non compos mentis*, to have his real estate sold and converted into personalty, yet as he can give no consent to any such conversion, it is but just that his rights and interests should be no further deranged or impaired than may be indispensably necessary; therefore it has been expressly declared that the proceeds of the sale of the real estate shall, in such cases, pass as realty to the heirs of such infant, or person *non compos mentis*, as if no such sale had been made: 1800, c. 67, sec. 5; 1816, c. 154, sec. 9; 1828, c. 26, sec. 3; 1829, c. 222.

An obvious consequence of this mutation of a wife's real estate into personalty is that it casts over the property thus changed, by what seems to be considered as the tacit consent or acquiescence of the wife (but certainly without her privy examination or express assent), all the law which regulates personal property belonging to the wife. As land, her husband could have only limited and qualified right to and enjoyment of it; she could not be deprived of it without her solemn, free, and express consent, which if not given, it would, after her death, pass to her

heirs; but as personalty, on being reduced into possession by the husband, it becomes absolutely his property, and may be wasted or disposed of by him without any control from her: *Chaplin v. Chaplin*, 3 P. Wms. 245. But subject to these principles in regard to the mutation of the property itself, the court of appeals has distinctly recognized the existence of that right of a *feme-covert* in regard to her property which her husband may ask a court of equity to put into his hands, called "the wife's equity;" and which can only be secured to her by a court of equity: *The State v. Krebs*, 6 H. & J. 37. In relation to which it has been laid down that where a husband comes into equity to obtain any of his wife's choses in action, the court will not receive her consent to bar her equity, until after the amount due to her has been ascertained; for though she may not think five hundred dollars the proper subject of a settlement, she may think differently of five thousand dollars: *Jernegan v. Baxter*, 6 Md. 32.

But although, in general, choses in action are not subject to be taken in execution, either at law or in equity, yet this interest, which has been held to be in the nature of an equitable chose in action, will be so far considered as parcel of the realty as to be subject to be intercepted by an order of this court for the benefit of the creditors of the deceased debtor where his personalty has been exhausted, or where the heir to whom it has been awarded is the debtor, and is beyond the jurisdiction of the state: *Ballzell v. Foss*, 1 H. & G. 504; *McCanthy v. Goold*, 1 Ball & B. 389.

The rules thus laid down upon this subject must, however, as it would seem, be received with some qualification. The six heirs of an intestate instituted proceedings at law to have the real estate which they claimed by descent divided among them; on the commissioners having made return of its value, and that it would not admit of a division without loss, one of them elected to take the whole, at the valuation. After which, the elector having failed to pay the valuation, one of the heirs, who had not been satisfied, brought an ejectment for his one undivided sixth part of the land descended, against the elector. Upon which it was held that a legal estate in fee in the land elected to be taken can not vest in the party electing to take, and pay the value, without his actually paying the persons entitled their just proportions of the value in money, or giving bonds to them for the same, agreeably to the act of assembly: 1802, c. 94; 1820, c. 191, secs. 20, 21, and 22: *Jarrett v. Cooley*, 6 H. & G.

258. Whence it would seem, that, although the elector may be regarded as a purchaser, yet, by his election alone, the estate is not thereby changed from realty to personalty, or from an undivided estate into an estate in severalty, until the value in money or bond has been actually paid or given, although the judicial proceedings under which the election had been made, may have been long before finally terminated: *Ridgely v. Iglehart, post.*

In the case now under consideration, the court is informed by the bill, that the surplus of the proceeds of the sale of the real estate of the late Jesse Jones, yet remains in the hands of the sheriff who made the sale, in obedience to a writ of *fiery facias*, which emanated from the court of appeals of the eastern shore; and, further, that there has been no administrator appointed to take charge of the personal estate of the intestate, Jesse Jones.

I feel perfectly satisfied that the surplus in the hands of the late sheriff, who is now here as a defendant, must be regarded as personalty; and as such, belongs not to the heirs, but to the personal representative of Jesse Jones. But there is no such person here as a party to this suit, and, without such a party, I hold it to be impracticable, by any decree of this court, to affect this surplus; which, as personalty, can only be called for from the hands of the personal representative of the intestate, to whom it rightfully and exclusively belongs; for, although creditors may be allowed to proceed against the heirs alone, in respect to the real assets descended to them, where there is no administrator, or the personalty has been altogether exhausted, yet they certainly can not be allowed, in this way, to obtain satisfaction of their claims from a merely personal fund, to which they direct the attention of the court, without making the administrator, who alone can be entitled to such fund, a party to the suit.

Supposing, however, that an administrator of the late Jesse Jones was here as a party to this suit, even then this defendant, Brown, the late sheriff, as regards his possession of this surplus, must be considered as an officer of the court of appeals; but can the chancellor order money which has been legally placed in the hands of an officer of the court of appeals, subject to their control, to be brought into this court, to be disposed of here as may be deemed right among the parties to this suit? This court might order an administrator, if there was such a person here as a party to this suit, to move the court of appeals

to direct their officer, this sheriff, to pay this surplus to him, the administrator. But the chancellor can give no such direction to this sheriff; because in undertaking to control an officer of the court of appeals, as to any disposition of money placed in his hands by their authority, the chancellor would thus bring this court into direct conflict with the jurisdiction of that tribunal, which certainly ought not to be done in any manner or under any circumstances whatever. Money in the hands of a sheriff, or of a third person, can not be taken under a *feri facias*, and the correctness of this position generally is recognized by the attachment act, 1715, c. 40, sec. 7; Parke's His. Co. Chan. 274, which gives what is called a judicial attachment as against third persons; but even that process can not be levied upon money which had been made and brought into the hands of a sheriff, by virtue of a writ of *feri facias*; because no third person or other court can be allowed to interfere with the execution of his duty, according to the command of the process of that court, under whose authority he was acting: *Turner v. Fendall*, 1 Cran. 133; *Armistead v. Philpot*, Doug. 231; *Willows v. Ball*, 2 New Rep. 376; *Fieldhouse v. Croft*, 4 East, 510; *Knight v. Criddle*, 9 Id. 48; *Stratford v. Twynam*, Jac. Rep. 418; 1831, c. 321. Hence, it is clear that this sheriff, Brown, has been improperly made a party to this suit.

Whereupon it is ordered that this case stand over, with leave to amend, and to make proper parties.

Afterwards the plaintiffs filed the following judgment, or direction of the court of appeals, for the eastern shore of Maryland:

"Ordered by the court, that Edward Brown, late sheriff of Kent county, pay to such trustee as the chancellor of Maryland shall appoint, the sum of one thousand four hundred and fifty-one dollars and thirty-eight cents, which sum of money the said Edward Brown, as sheriff aforesaid, in his return upon a writ of *feri facias*, issued from this court at the suit of Thomas Dawson against Jesse Jones, states to have remained in his hands after paying and satisfying the debt, damages, costs and charges due upon the said *feri facias*, and the taxes and fees due to him, the said Edward Brown, as late sheriff and collector of Kent county. The said sum of money being part of the real estate of the said Jesse Jones, deceased. The chancellor will distribute and dispose of the same as he shall deem equitable and proper."

The case being thereupon submitted to the chancellor, without argument, he made the following decree:

BLAND, Chancellor. Decreed, that in obedience to the order of the court of appeals, for the eastern shore of Maryland, filed in this case on the sixth instant, the said sum of one thousand four hundred and fifty-one dollars and thirty-eight cents, mentioned in the bill of complaint, be paid by the said Edward Brown to John B. Eccleston, the trustee hereinafter named; which money having been declared by the said order to be a part of the real estate of Jesse Jones, deceased, when received by the said trustee he shall bring into this court to be applied under the chancellor's direction, after deducting the costs of this suit, and such commission to the trustee as the chancellor shall think proper to allow in consideration of the skill, attention, and fidelity wherewith he shall appear to have discharged his trust; that before the said trustee shall be entitled to receive the said sum of money, he shall file with the register of this court the bond hereinafter mentioned; that provided the said sum of money shall be paid by the said Edward Brown on or before the first day of January next, no interest thereon shall be demanded; but if not then paid he shall from that time be required to pay interest on the same.

It is further decreed, that the lands in the proceedings mentioned be sold; that John B. Eccleston be appointed trustee to make the sale, etc.; and that the trustee, at the time of advertising the said property for sale, give notice to the creditors of the said Jesse Jones to file the vouchers of their claims in the chancery office, within four months from the day of sale.

The trustee made sale of the realty accordingly, and having received the surplus from defendant, Brown, and given notice to creditors, the whole estate was finally distributed, after allowing to the two widows a portion of the proceeds of the realty sold by the trustee in lieu of their dower.

JUDGMENT IS A LIEN upon the debtor's realty co-extensive with the territorial jurisdiction of the court: *Roads v. Symmes*, 13 Am. Dec. 620. The death of one of several joint judgment-debtors does not discharge the lien upon his property: *Ex parte Dixon*, 12 Am. Dec. 92. In *Anderson v. Tuck*, 33 Md. 233, the principal case is recognized as authority upon the point that the lien of a judgment attaches from its date.

EXECUTION BINDS THE DEFENDANT'S GOODS from delivery only: *Beals v. Guernsey*, 5 Am. Dec. 348; *Haggerty v. Wilber*, 8 Id. 321; *Cresson v. Stout*, Id. 373; see, also, *Tabb v. Harris*, 7 Id. 732. In North Carolina, an execution is binding from its date, and one first tested will take priority over one

of junior *teste* first delivered and levied: *Green v. Johnson*, 11 Am. Dec. 763, and cases cited in the note thereto.

DEATH OF PLAINTIFF OR DEFENDANT AFTER LEVY.—It was held in *Buckner v. Terrill*, 12 Am. Dec. 269, that an execution is not abated by the death of the plaintiff after a levy has been made. In *Bristow v. Payton*, 15 Am. Dec. 134, it was decided, contrary to the doctrine of the principal case, that upon the death of the defendant in execution, even after a levy, the sheriff could not proceed without a revivor. But in *Massie's Heirs v. Long*, 15 Am. Dec. 547, the court held that if the defendant in execution should die after the levy, the sheriff might nevertheless proceed; but that if the death should occur before the levy, but after the execution was sued out, the sheriff could not go on with the writ, and if he did so, a sale thereunder would be void. An execution not tested in the debtor's life-time can not issue after his death without a *sci. fa.*: *Woodcock v. Bennet*, 13 Am. Dec. 568.

FORSNILL v. MURRAY.

[1 BLAND'S CHL. 479.]

MARRIAGE IS A CIVIL CONTRACT, as well as a religious vow, which, while it is invalidated by want of consent, is, if valid, obligatory upon the parties during their joint lives, and can not be cast off at pleasure.

SOLEMNIZATION IN THE FACE OF THE CHURCH, or by a clergyman, is the most correct, if not the only legal, mode of contracting marriage in this state.

COHABITATION, REPUTATION, and the fact that the parties have represented themselves as husband and wife, are generally sufficient evidence of a marriage; the only exceptions are in prosecutions for bigamy and actions of criminal conversation.

DIVORCE IN THIS STATE can be granted only by an act of the legislature.

JURISDICTION CONCERNING ALIMONY has been devolved on the court of chancery.

COUNTY COURT MAY INQUIRE INTO THE VALIDITY of a marriage in certain cases.

COURT OF CHANCERY CAN NOT DETERMINE THE VALIDITY of a marriage except when procured by abduction, terror, or fraud.

VOIDABLE MARRIAGE CAN BE QUESTIONED in England only by a direct suit for that purpose in the spiritual court.

AFTER THE DEATH OF ONE OF THE PARTIES to a marriage, no judicial proceeding can be had to inquire into its validity.

MARRIAGE QUESTIONED AFTER DEATH OF PARTY, WHEN.—The validity of a marriage may be inquired into after the death of a party where it, or the legitimacy of the issue, forms a link in a chain of title.

MARRIAGE VALID WHERE CELEBRATED is valid everywhere.

CHANCELLOR MAY DETERMINE A QUESTION OF LEGITIMACY in a chain of title without the aid of a jury where the proof is clear.

BILL for an account against the defendant Murray, as administrator *de bonis non* of Henry Somervell, deceased, with whom was joined as defendant the administrator of Thomas Somervell, deceased, the brother of the said Henry. The plaintiffs

claimed in their bill that they and the said Thomas, now deceased, were sole next of kin of the said Henry. Two of the plaintiffs were the children of Mary, a deceased sister of the said Henry, by her marriage with one Andrew Davidson. The other plaintiffs were the children of the said Mary by a subsequent marriage with one William Fulton. The defendants, by their joint and separate answer, claimed that the plaintiffs were illegitimate, for the reason that when the said Mary married the said Andrew Davidson and William Fulton, she had a husband living in Ireland, to wit, John Lewis, to whom she was lawfully married in 1789. The marriage was proved by the testimony of two witnesses who were present at the ceremony, and who, with several other witnesses, testified that after the said marriage, the said John and Mary cohabited as husband and wife, and were reputed to be so in the neighborhood for two years, when the said Mary abandoned her husband and went to America; and that the said John was still living in Ireland. An Irish attorney, whose deposition was taken, testified that such a marriage as that described by the other witnesses, was valid in Ireland.

BLAND, Chancellor. This case standing ready for hearing, and having been submitted without argument, the proceedings were read and considered.

Marriage has been considered among all nations as the most important contract into which individuals can enter, as the parent, not the child, of civil society: *Dalrymple v. Dalrymple*, 2 Hag. Con. 54. It would seem that in the dark ages a notion prevailed of the mysterious nature of the contract of marriage, in which its spiritual nature almost entirely obliterated its civil character; by which notion some were carried so far as to say that a marriage of an insane person could not be invalidated on that account. In more modern times, it has been considered in its proper light, as a civil contract, as well as a religious vow, and like all civil contracts, will be invalidated by want of consent of capable persons: *Turner v. Meyers*, 1 Hag. Con. Rep. 414; *Browning v. Reane*, 2 Phill. Rep. 69; Shelf. Lun. 59, 446; *Portsmouth v. Portsmouth*, 1 Hag. Rep. 355. It has been most commonly everywhere celebrated by some religious solemnities; and from its nature and objects, has been held to be obligatory during the joint lives of the parties, without the power of being thrown off at the pleasure of either or both of them: *Gordon v. Pye*, Fergusson's Rep. Appen. note A, 349; *Westmeath v. West-*

meath, 1 Jac. Rep. 138; except, perhaps, in the single instance, according to the ancient and now obsolete law, where the husband or wife, with the consent of the other, became a monk or nun professed, whereby the contract of marriage was virtually dissolved: Co. Lit. 132.

According to the law of England, a contract of marriage is not deemed complete, so as to entitle the wife to dower, and the issue to inherit, unless it be celebrated in the face of the church, or with the blessing of a priest: *Dalrymple v. Dalrymple*, 2 Hag. Con. Rep. 54. In Scotland, no religious ceremony is necessary to constitute a legal marriage: *Id.*; and in England, during the time of the commonwealth, marriage was allowed to be contracted before a justice of the peace: 4 Bac. Abr. 531, 536. In Maryland, there was a time when marriage might have been legally contracted before a county court or in presence of a magistrate: 1702, ch. 1, sec. 4; 1715, ch. 44, sec. 25; but other provisions having been made upon the subject by the legislature of the province: 1717, ch. 15, and by the general assembly of the state: February, 1777, ch. 12; it would now seem to be certainly the most correct, if not the only legal mode of contracting marriage, here as in England, by having it celebrated in the face of some church, or with the blessing of a clergyman.

In general it is sufficient to show that a man and woman have cohabited as husband and wife; have represented themselves as such; or have been reputed in the neighborhood of their residence to have been legally married, to establish the fact of their marriage and the legitimacy of their children. The only exceptions to this rule are the cases of a prosecution for bigamy, and an action of criminal conversation, in each of which proof of an actual marriage is necessary. For although the action of criminal connection is, in its form, properly a civil action, yet it is in the nature of a criminal prosecution; and if proof of cohabitation or reputation were received as alone sufficient evidence of the marriage, it would place it in the power of the parties to collude together and pass themselves off as husband and wife occasionally, for the express purpose of profiting by such a suit: *Morris v. Miller*, 4 Burr. 2057; *Birt v. Barlow*, Doug. 171. But although in such cases the mere general reputation of a marriage may not be deemed sufficient, yet it appears that the deliberate admission of the defendant in an action of criminal conversation, that the woman was the wife of the plaintiff; or the confession of the accused of the fact of the first marriage in a prosecution for bigamy,

will even in those cases be received as sufficient to establish the fact of the marriage: Stark. Ev., pt. 4, 36 and 1185.

In England the spiritual court has jurisdiction to inquire into the validity of a contract of marriage; and may, in certain cases, determine that it is wholly void, or decree that it be dissolved, and that the parties be divorced; but in all cases not falling within the jurisdiction of the ecclesiastical courts, the parliament alone can grant relief: 4 Bac. Abr. 554. In Maryland, there never having been an ecclesiastical court, and no power to grant a divorce by annulling for any cause, a contract of marriage which was originally valid ever having been conferred upon any of the courts of justice, it follows that a divorce can only be granted by an act of the general assembly: *Ullerton v. Twiss*, Fergusson's Rep. 23¹; *Mrs. Levell's case*, Id. Appen., note G. 382. But all questions concerning alimony, even under the provincial government, were considered as having devolved upon the court of chancery. It was, however, provided, February, 1777, ch. 12, sec. 15, that the general court should have power, on an indictment, or by petition of either party, to inquire into the validity of any marriage, and might declare any marriage contrary to the marriage act, or any second marriage, the first subsisting, null and void. This law, as it would seem, may now, since the abolition of the general court, on proper application, be executed by a county court. This court has been clothed with no such authority to determine the validity of a contract of marriage; but, by virtue of its general jurisdiction in matters of fraud affecting contracts, it would seem that, considering marriage as a mere civil contract, it may, at the instance of either party, declare a marriage to be null and void which has been procured by abduction, terror, and fraud: *Portsmouth v. Portsmouth*, 1 Hag. Rep. 355; *In matter of Fust*, 1 Cox, 418; *Ex parte Turing*, 1 Ves. & Bea. 140; *Ferlat v. Gojon*, 1 Hopk. Ch. 478 [14 Am. Dec. 554].

In England the validity of a marriage which is not absolutely void, but merely voidable, can only be drawn in question and determined in a suit instituted for that purpose in the ecclesiastical court. But, as by the death of the husband, or the wife, the marriage is at an end, so any then depending suit which may have been instituted during their lives for that purpose, is thereby immediately abated, and can not be in any way revived or further prosecuted; nor can any other judicial proceeding be thereafter instituted in the ecclesiastical courts, or

1. *Ullerton v. Twiss*, Fergusson R. 23.

elsewhere, for the purpose of declaring a marriage, which has been thus terminated by the death of either party, to have been null and void, for the purpose of bastardizing the issue of such marriage, or barring the husband of his courtesy, or the widow of her dower; nor can any one, by any judicial proceeding, be bastardized after his death, who had carried the reputation of legitimate during his life; because wrongs and personal defects die with the individual; and the peace of families and the nature of the testimony by which alone pedigrees are capable of being traced, in cases where a party makes title by descent, require that there should be a limitation beyond which the institution of any judicial proceeding for the purpose of trying the validity of any marriage or the legitimacy of any person ought not to be allowed: Co. Lit. 33; 1 Hall. Const. Hist. Eng. 395; *Kenn's case*, 7 Co. 142¹; *Hinks v. Harris*, 4 Mod. 182; *Hemming v. Price*, 12 Mod. 432; *Haydon v. Gould*, 1 Salk. 119; *Brown-sword v. Edwards*, 2 Ves. 245; *Elliott v. Gurr*, 2 Phill. 16. If these principles be correct, and as entirely applicable here, under different forms of judicial proceedings, as in England, it follows that there can now, after the death of Mary, be no judicial proceeding had to declare her second and third marriages, with Davidson and with Fulton, void for the purpose of bastardizing her issue by either of them.

But the issue of Mary, by her second and third marriages, which were absolutely void, not merely voidable, are here claiming as parties to this suit, and found their title to recover materially and essentially upon the validity of those marriages, and their own legitimacy as the fruit of them. In all such cases, where a party claims as heir, or next of kin, and his own legitimacy, or that of the deceased under whom he claims, is thus necessarily involved, and put in issue, it never has been questioned, that the court might inquire into and decide upon the validity of the marriage, or the fact of legitimacy. This has been often done in England: *Alleyne v. Grey*, 2 Salk. 437; *Mace v. Cadell*, Cowp. 233; *Stark Ev.*, 4 pt. 218, 931; and has also been allowed by the courts of this state: *Cheseldine v. Brewer*, 1 H. & McH. 152; *Ferlat v. Gojon*, 1 Hopk. 494 [14 Am. Dec. 554]; because, wherever the validity of a marriage, or the legitimacy of a party, forms a component part of the matter in controversy, it becomes indispensably necessary, that the court should inquire into and determine upon that fact, as well as every other part of the case; for otherwise, it would be to sup-

1. *Kenn's case*, 7 Co. 42.

pose a suit brought before a court which had not a capacity to try the cause of action: 1 Bac. Abr. 571. And upon that ground, although it is perfectly well settled that the court of chancery has no criminal jurisdiction whatever, and is in its institution and forms of procedure absolutely civil, yet, if a bill be filed in it for the purpose of setting aside a deed, or to be relieved against a will on the ground of fraud, the instrument complained of may be shown to be a forgery; and the fact of forgery may, when thus incidentally involved, be determined and relief given, founded upon a criminal fact, although it would be altogether improper for it directly to decide upon any such question upon a criminal charge: *Barnesly v. Powel*, 1 Ves. 120, 287; *Stace v. Mabbot*, 553; *Duntze v. Levell*, Fergusson's Rep. 63; *Stark. Ev.*, 4 pt. 931; *Peake v. Highfield*, 1 Russ. 560.

It appears that the first marriage of Mary with John Lewis, was legally had, and solemnized in Ireland; hence, according to the law of nations, it must be held to be a valid marriage here; for otherwise the rights of mankind would, in this respect, be in a most precarious and uncertain condition: *Roach v. Garvan*, 1 Ves. 159; *Herbert v. Herbert*, 3 Phill. 58; *Duntze v. Levell*, Ferg. Rep. 63; *Edmonstone v. Lockhart*, Id. 168; *Buller v. Forbes*, Id. 209; *Herbert v. Herbert*, 2 Hag. Cons. 363; *Ruding v. Smith*, Id. 371. And consequently, the subsequent marriages of Mary, in Maryland, with Davidson, and after his death with Fulton, while her husband, John Lewis, was alive, must be considered as utterly void.

When a question of legitimacy becomes thus involved in a controversy in a court of chancery, it is said to be usual to make up an issue, and have the matter tried by a jury, who are the proper judges of fact: *Revel v. Fox*, 2 Ves. 270; *Read v. Passer*, 1 Esp. 213. But it is not indispensably necessary, in any case, that the chancellor should have any fact determined by a jury. It is only when he entertains a reasonable doubt as to the fact, and when it depends on evidence, the weight of which can be better estimated by a jury, or where the testimony is very obscure and contradictory, if he thinks fit that the chancellor, for the information of his own conscience, may have recourse to this auxiliary mode of obtaining it: *Short v. Lee*, 2 Jac. & Walk. 496; *Peake v. Highfield*, 1 Russ. 560. But in this case the proof is so clear and demonstrative, that there is not the smallest room for a doubt upon the subject; therefore, I hold it to be my duty to pronounce an immediate decree.

The proofs clearly establish the fact, that the late Mary, the

mother of the plaintiffs, had been, long previously to their birth, legally married, and was then the lawful wife of a certain John Lewis, who, at the time of the marriage, and continually ever since, has resided, and is now living in Ireland. And consequently these plaintiffs, who were all born in Maryland, many years after their mother came to and resided in this state, are all of them illegitimate; and as such, they can not take as her legal representatives, or as the next of kin of the late Henry Somervell. The act of 1825, ch. 156, has no retrospective operation, and therefore can not affect this case.

Whereupon it is decreed that the bill of complaint be dismissed, with costs, to be taxed by the register

SOLEMNIZATION OF MARRIAGE is not necessary to its validity, unless made so by statute, but a marriage *per verba de presenti* is valid, and an actual marriage may be inferred from proof of cohabitation, reputation, and declarations of the parties: *Fenton v. Reed*, 4 Am. Dec. 244, and note; *Londonderry v. Chester*, 9 Id. 51, and note; *Allen v. Hall*, 10 Id. 578; *Cannon v. Alsbury*, Id. 708; but see *Ligonis v. Buxton*, 11 Id. 46.

LEX LOCI CONTRACTUS GOVERNS.—A marriage, valid in the country where it is celebrated, is valid everywhere: *Medway v. Needham*, 8 Am. Dec. 131. But see the note to that case. See, also, the note to *Hanover v. Turner*, 7 Am. Dec. 208; *De Couche v. Savetier*, 8 Id. 478; and *Le Breton v. Nouchet*, 5 Id. 736.

MARRIAGE PROCURED BY FRAUD, abduction, or terror, may be vacated in a court of equity: *Ferlat v. Gojon*, 14 Am. Dec. 554.

JURISDICTION TO GRANT ALIMONY. See *Fischli v. Fischli*, 12 Am. Dec. 251, and note; and *Almond v. Almond*, 15 Id. 781.

DUVALL v. WATERS.

[1 BLAND'S CH. 569.]

WASTE AND TRESPASS DISTINGUISHED.—Waste is the abuse or destructive use of property by him who has not an absolute unqualified title; trespass is an injury or unauthorized use of another's property by one who has no right whatever.

COMMON LAW REMEDIES AGAINST WASTE were: A prohibition commanding the sheriff to prevent its being done, and a writ of waste after the injury had been done to recover the place wasted and treble damages.

NO COMMON LAW PROCESS TO PREVENT TRESPASS.—There was no process at common law to prevent a threatened trespass upon realty, however great or irreparable.

WRIT OF ESTREPEMENT lay at common law in aid of an action to recover real property to prevent any injury being done thereto pending the controversy. This remedy is corrective as well as preventive; for if the prohibition is violated the plaintiff may recover damages.

THIS WRIT IS TREATED AS A REMEDY AGAINST WASTE, but where there is no privity of title between the parties in the action to which it is auxiliary, the injury which it seeks to prevent is, in chancery acceptation, trespass rather than waste.

EVENTUAL WASTE is that done by an admitted particular tenant after the institution of a suit involving the title, or a partition suit.

JURISDICTION IN CASE OF WASTE.—The subject of waste has passed almost exclusively into the cognizance of the court of chancery in this state.

INJUNCTION LIES TO STAY WASTE whenever an action of waste would lie, whether there is any privity of title or not, and in other cases where such an action could not be brought.

CASES OF INJUNCTION AGAINST WASTE discussed by the chancellor.

INJUNCTION AND ACCOUNT OF PAST WASTE may be sought in one suit, but a bill for an account of waste will not lie where an injunction can not be asked or granted.

IN ENGLAND AN INJUNCTION TO STAY WASTE will be granted where there is a subsisting privity of title or contract admitted by the answer, or an uncontroverted legal or equitable title in the plaintiff; but not where the bill states that the defendant relies upon an alleged adverse title in himself, or where the plaintiff's title is positively denied by the answer.

INJUNCTION AGAINST TRESPASS LIES, IN ENGLAND, only in strong cases of destruction or irreparable mischief.

TO PREVENT WASTE, PENDING A SUIT to determine a title, the only remedy in England seems to be the writ of estrepement, which has fallen into disuse; although in a variety of other cases the court of chancery exercises its conservative power to protect the subject of litigation from waste, injury, or loss, pending a suit.

INJUNCTION TO STAY WASTE PENDING LITIGATION LIES IN THIS STATE wherever an action at law or suit in equity has been brought in which the title has been or may be drawn in question, whether the subject of the controversy be realty or personalty.

PRIVITY OF TITLE OR CONTRACT IS UNNECESSARY to support the injunction in such cases.

SUCH INJUNCTION IS AUXILIARY TO THE SUIT OR ACTION involving the title, and follows its fate.

DENIAL OF THE PLAINTIFF'S TITLE IN THE ANSWER does not warrant the dissolution of an injunction against waste pending the suit.

ORDINARY USE AND CULTIVATION ARE NOT INHIBITED by such an injunction.

INJUNCTION DOES NOT LIE TO PREVENT A MERE TRESPASS, not instant and irreparable, when no suit or action has been instituted involving the title.

SEPARATE BILL FOR AN INJUNCTION AGAINST WASTE, pending a suit here to try the title, is irregular; the relief should be sought by a petition in the original suit.

FRAUDULENT CONVEYANCE is void against creditors.

LAND COULD NOT BE SOLD ON EXECUTION at common law, but it is otherwise in this state by statute.

TITLE PASSES BY THE SALE of land under a *feri facias*, but there must be some written and recorded evidence of the sale.

RETURN OF A SALE OF LAND, on execution, must be made describing the property with sufficient precision to enable it to be identified.

TECHNICAL ACCURACY IN THE DESCRIPTION is unnecessary in such a case.

BILL filed by Charles Duvall to set aside as fraudulent a conveyance made by the defendant, Nathan Waters, to Nathan I. Waters and Samuel Ratcliff, also defendants, of certain land claimed by the plaintiff as purchaser at a sale on execution against the defendant, Nathan Waters, made subsequent to the conveyance aforesaid. The facts are stated in the opinion of the chancellor on the final hearing. Before the hearing the plaintiff filed a separate bill against the same defendants, reciting the nature and pendency of the former bill, stating that the defendants, since the institution of the suit, had been committing waste by cutting, destroying, and removing timber, etc., and praying an injunction against the same. The injunction was granted. Subsequently the defendants put in an answer denying the plaintiff's title and the facts upon which it rested, and averring that the conveyance by Nathan Waters was for a good and valuable consideration, and then gave notice of a motion to dissolve the injunction.

BLAND, Chancellor. The motion to dissolve the injunction standing ready for hearing, the solicitors of the parties were heard, and the proceedings read and considered.

It has been urged, in support of this motion, that this was not merely and properly a case of waste, but an injunction, in restraint of trespass, granted at the instance of a plaintiff who claimed title; which title had been directly and positively denied by the defendants. And that according to the well-established law of this court, as deduced from the English authorities, no such injunction could be granted or continued where the title of the plaintiff, as in this instance, was admitted to be in dispute, or was altogether denied by the defendant in his answer. This objection is certainly well founded upon the principles of the English law; but it is otherwise according to the law of Maryland. This is the first instance, since I have been here, in which the correctness of this peculiar species of injunction has been called in question; and as its origin and nature seem to have fallen into some degree of obscurity, it may be well to take a larger view of the subject than might otherwise be deemed necessary.

The terms waste and trespass are very often used to designate injuries to property of the identical same nature. The cutting of a timber tree, or the pulling down of a house, may

be an act entirely lawful; or it may be an act of waste, or of trespass, and that not because of any peculiarity in the act itself; but, because of the party, by whom it may have been done, having an absolute title, a limited estate, or no right whatever. The absolute owner of an estate in fee simple, without any incumbrance or charge upon it, has an uncontrollable power to dispose of it as he may think proper; and can be in no way held accountable, as a waster or trespasser, for any thing he may do with the trees, houses, or soil of his lands. If he who does such an act has only a particular estate, as a tenancy for life or years, it is properly said to be a trespass. In general, when any permanent or lasting injury is done by the holder of the particular estate to the inheritance, or to the prejudice of any one who has an interest in the inheritance, it is properly called waste; as where timber-trees are felled, or houses are destroyed, by a tenant for life or years; or by mortgagor or mortgagee in possession; or by a tenant in fee simple, where the state has reserved to itself an interest in the trees, etc., for the use of the public. In general, waste is the abuse or destructive use of property by him who has not an absolute, unqualified title. And in general, trespass is an injury, or use without authority, of the property of another, by one who has no right whatever.

At common law, if the owner of the inheritance had good reason to believe that a tenant in dower, or by the courtesy, or a guardian designed to commit waste, he might, before any waste was done, have a prohibition directed to the sheriff, commanding him to prevent it from being done; and in execution of this writ of prohibition the sheriff might, if necessary, call to his aid the *posse comitatus*. This writ was extended by a statute passed in the year 1267, to tenants for life and for years; and afterwards, in 1285, it was taken away and another form of writ given in its place; but, when the court of chancery first granted injunctions, it seems to have taken its jurisdiction from this writ of prohibition of waste: Co. Lit. 53; 2 Inst. 299, 389; 52 Hen. III. c. 23; 13 Edw. 1, c. 14; Kilt. Rep. 209, 212; *Jefferson v. Bishop of Durham*, 1 Bos. & P. 108, 121; *Goodeson v. Gallatin*, Dick. 455.

After waste had been actually committed, the ancient corrective remedy, in a court of common law, was by a writ of waste for the recovery of the place wasted, and treble damages as a compensation for the injury done to the inheritance: Co. Lit. 53; 2 Inst. 300. There were, however, several cases to which the writ of waste did not extend, and as to such cases the

party was left without any remedy at common law. The action of waste could only have been brought by him who had the immediate reversion or remainder, to the disinheritor of whom the waste was always alleged to have been committed, and therefore, if a lease had been made to A. for life or years, remainder to B. for life, and A. committed waste, the action could not be brought by him, in reversion or remainder, so long as the life estate of B. continued. But the intervening life estate only suspended the remedy, for after its termination the reversioner and remainderman might then bring his action against A. for the waste done before that time: Co. Lit. 53; *Clifton's case*, 5 Co. 76. Nor could any one maintain this action unless he had the estate of inheritance in him at the time the waste was committed; not could it be sustained against an executor for waste committed by his testator, it being a wrong which died with the person; nor could one co-parcener bring an action of waste against another, although one joint tenant or tenant in common might have a writ of waste against his cotenant, compelling him either to make partition and take the place wasted as his own share, or to give security not to commit any further waste: 2 Inst. 302, 305, 403; 3 Black. Com. 227.

At the common law there was no process by which a threatened trespass upon a real estate, however great or irreparable, could be prevented. After the act was done, the injured owner might bring his action of trespass against the wrong-doer, and recover satisfaction in damages, but the common law gave him no means of preventing the execution of the designs and threats of any one whose declared and settled purpose was to commit a trespass upon his lands. If, however, the claimant was not in possession, and he thought proper to bring an action to establish his right and recover the estate, then, and in aid of such suit, and to prevent any injury from being done to the property pending the controversy, the common law gave him the writ of estrepement: Jacob, L. Dict. verb. Estrepement. It would seem that originally this writ could only be used as an aid to a real action for the recovery of the land itself, but its scope having been extended by the statute, it was afterwards used in connection with actions in which no land was demanded, as in actions of waste, trespass, etc. It was not, however, allowed to be associated with a suit for partition, because, the tenants being both of them in possession, there was no reason why one should be restrained and not the other. A writ of estrepement might be sued out at the same time, and together with the original

writ, commencing the action, and that, too, in those cases where damages for waste done pending the action might be recovered, because it was injurious to the commonwealth that waste should be done, and peradventure he who committed it might not be able to satisfy the plaintiff his full damages: 2 Inst. 328.

The writ of estrepement is certainly a preventive remedy, and so far it is analogous to a writ of prohibition, by which a tenant in dower, or by the courtesy, might be prevented from doing waste. But it is more; it is also a remedial and corrective remedy, because the holder of land may not only be prevented from doing waste, but if he should do any, notwithstanding the prohibition, the plaintiff may recover damages for such waste, even up to the time when possession shall be delivered to him. This writ has some other peculiar traits of character. It can never be brought into action independently and alone; it must always be associated with another as its leader, to which it acts as an auxiliary, whose fortunes it must follow, and to whose final fate it must submit. If it emanates, as it may, at the same time and together with its chief, from the chancery office, it is then called an original; but if it be awarded by the court in which the action is depending, as it may, it is then called a judicial writ of estrepement. This writ, as its very name distinctly imports, is always intended to stay waste. It is nowhere spoken of as a means by which a mere trespass may be prevented; in all its modifications it is continually treated as a remedy against waste: F. N. B. 139; 2 Inst. 328; 3 Black. Com. 225; Jacob, L. Dict. verb. Estrepement. But in a writ of right, and in all the other actions, except a writ of waste, to which an estrepement is called in as an auxiliary, there is not any privity of title whatever between the parties to the suit, all such privities being expressly disavowed. The plaintiff asserts, and calls for the vindication of his absolute title against an unqualified wrong-doer, who he complains of as a disseisor, ejector, or trespasser. And, therefore, in all such cases, the injury which it is the office of the writ of estrepement to prevent is not properly waste, founded on privity of title, as between a reversioner and a particular tenant, but literally a trespass, in the chancery acceptation of that term, and not a mere abusive use of that which a lawful holder had a right to enjoy.

Where the title and the rights of the parties are admitted, there can be no mistake; and therefore there should be no

confusion or misapplication of these terms, waste and trespass. But in the English authorities there is not the same distinctness in the application of them to any such injuries to the inheritance, where the rights of the parties are disputed and put in litigation. If the party asserts his title to an estate by an action at law, such acts, with reference to a presumption in favor of the validity of his title pending the suit, are said to be waste; but if he asks, in a court of chancery, to have the doing of such acts prevented by an injunction, they are denominated trespasses: *Eden*, Inj. 136; *Mitchell v. Dors*, 6 Ves. 147; *Crockford v. Alexander*; 15 Id. 138; *Mogg v. Mogg*, Dick. 670. This difference in characterizing the same injurious acts, when proposed to be prohibited by an estrepement as waste, and when proposed to be restrained by injunction as trespass, has been attended with some confusion. And, therefore, in relation to the peculiar species of injunctions now under consideration, all such acts as would be deemed waste when done by an admitted particular tenant, if done after the institution of any suit involving the title, or of a suit for partition, it may be well to denominate eventual waste.

The judicial records of the state, and the acts of assembly regulating officers' fees, show that the writ of waste, as well as the writ of estrepement, were at one time in common use in Maryland: 2 Harr. Ent. 149, 800; *Adams v. Brereton*, 3 H. & J. 124; 1763, c. 18, secs. 89 and 94; 1779, c. 25, sec. 2. But here, as in England, these writs have fallen into disuse, and are now seldom or never brought; having given way to the more easy and expeditious remedy by an action upon the case in nature of waste at common law; by which the plaintiff obtains satisfaction for the injury done to his inheritance by a recovery of damages alone: 3 Black. Com. 227; *Greene v. Cole*, 2 Saund. 252, note 7;¹ *White v. Wagner*, 4 H. & J. 373 [7 Am. Dec. 674]; *McLaughlin v. Long*, 5 H. & J. 113; and in Maryland to an injunction from chancery, which performs the office of a writ of estrepement.

The whole subject of waste in Maryland seems to have passed almost altogether from the cognizance of the courts of common law, to that of the court of chancery, and the shifting of this matter so entirely, from the one jurisdiction to the other, may be attributed to the nature of the injury requiring redress; to the different constitutions of the tribunals; and to their peculiar modes of proceeding. Waste is a wrong which can not always be duly estimated and remunerated in dam-

1. *Greene v. Cole*, 2 Saund. 252, note 7.

ages; it is an injury which requires to be met, in its onset or earliest approaches, by a strong and decisive preventive remedy, acting with a promptness almost amounting to surprise, and yet affording to the party restrained a speedy hearing. No adequate remedy of this kind, it is evident, can be obtained from a court of common law, open only at short intervals during the year, acting from term to term, and limited to a given set of technical forms of proceeding. Hence it is, that the remedy has been so constantly, in modern times, sought in the court of chancery, which is always open, constantly accessible, and is capable of moving with an energy and dispatch called for by the emergency, and suited to the peculiar nature of the case.

In general, an injunction may be obtained in this state, as in England, to stay waste in all cases where an action of waste would lie at common law, whether there be any privity of title or not: *The Mayor and Com. Norwich v. Johnson*, 3 Mod. 90; S. C., 2 Show. 457; and in a variety of others in which no action could be brought, even where there was a subsisting privity of title or contract between the parties. A mere threat to commit waste is a sufficient foundation for an injunction, before any waste has been actually done: *Gibson v. Smith*, 2 Atk. 183; *Hannay v. McEntire*, 11 Ves. 54; *Coffin v. Coffin*, Jacob, 70. And an injunction may be granted where no account of damages could be claimed; or where the waste done is so insignificant that there could be no recovery of damages at law: *The Universities of Ox. and Cam. v. Richardson*, 6 Ves. 706; *The Keepers, etc., of Harrow School v. Alderton*, 2 Bos. & P. 86. It may be granted in favor of a child, *en ventre sa mere*: *Robinson v. Lillon*, 3 Atk. 211; in favor of trustees to preserve a contingent remainder before the contingent remainderman has come *in esse*: *Garth v. Cotton*, 3 Atk. 754; in favor of any one entitled to a contingent or executory estate of inheritance: *Bewick v. Whitfield*, 3 P. Wms. 268, note; *Hayward v. Stillingfleet*, 1 Atk. 422; and in favor of a remainderman or reversioner, where there is an intervening estate for life: *Bewick v. Whitfield*, 3 P. Wms. 268, note; *Farrant v. Lovel*, 3 Atk. 723. An injunction may be obtained in respect of equitable waste, against a tenant in tail after possibility of issue extinct: *Abraham v. Bubb*, 2 Freem. 53; against a tenant for life without impeachment of waste: *Lord Bernard's case*, Prec. Chan. 454; and against a mortgagor or mortgagee in possession: *Farrant v. Lovel*, 3 Atk. 723; *Humphreys v.*

Harrison, 1 Jac. & Walk. 561.¹ An injunction may be granted as between tenants in common, joint tenants and co-parceners, against malicious destruction; or when the tenant committing the waste is insolvent, or is occupying tenant to the plaintiff: *Smallman v. Onions*, 3 Bro. C. C. 621; *Hole v. Thomas*, 7 Ves. 589; *Twort v. Twort*, 16 Id. 128. And so, too, where some of the heirs had filed their bill in this court against the rest, to obtain a partition according to the act to direct descents, and one of the heirs, who was in possession, was committing waste; upon a representation of the fact by the trustee appointed to make sale of the lands, for the purpose of effecting a partition, he was restrained by injunction: *Clarke v. Clarke*, MS., twenty-fourth of January, 1822. When the bill is for an injunction to stay further waste, and waste has been already committed, the court, to prevent a double suit, will decree an account and satisfaction for what is past, and not oblige the plaintiff to bring an action at law, as well as a bill in equity; but such decree for the past is only given as an incident to the injunction, to obtain which the plaintiff was under a necessity of coming into chancery; and, consequently, it may be regarded as a general rule, to which there are few exceptions, that when no injunction is or can be asked for or granted, a bill to have an account of past waste, and nothing more, can not be sustained, the proper remedy being at law: *Jesus College v. Bloom*, 3 Atk. 262; *Eden*, Inj. 146.

It appears that the English court of chancery had steadily confined itself in granting relief against waste to those cases only where there was some subsisting privity of title or contract between the parties until about the year 1785, since which time it has gone one step further, and granted injunctions against strangers to stay trespass in strong cases of destruction or irreparable mischief; or where the irreparable mischief might be completely effected before any trial could be had as to the controverted right. But at that point, it seems to have come to a stand; not, however, without expressing a regret that its jurisdiction had not been extended so far as to protect real estate from waste and injury pending a controversy about the title. I have seen no reason to doubt that the powers of this court in granting injunctions have been always considered as in all respects co-extensive with those of the chancery court of England: *Pillsworth v. Hopton*, 6 Ves. 51; *Mitchell v. Dors*, Id. 147; *Hanson v. Gardiner*, 7 Id. 305; *Smith v. Collyer*, 8 Id. 89;

1. *Humphreys v. Harrison*, 1 Jac. & Walk. 581.

Courthope v. Mapplesden, 10 Id. 290; *Crockford v. Alexander*, 15 Id. 138; *Norway v. Rowe*, 19 Id. 147; *Jones v. Jones*, 3 Meriv. 173.

It appears to be even yet the fixed rule of the court of chancery of England that the granting of an injunction to stay waste must depend either upon the fact of there being a privity of title or contract acknowledged by the answer; or an unquestionable legal or equitable title in the plaintiff, as where a purchaser files a bill for a specific performance of his contract, suggesting that the defendant was proceeding to cut timber, etc., an injunction may be granted, if the contract be stated and admitted. For if the bill states and admits that the defendant asserts and relies upon what he alleges to be a valid adverse title in himself, the plaintiff thereby states himself out of court, or if the defendant in his answer positively denies the plaintiff's title, the injunction will be refused, or, having been granted, will, on the coming in of such an answer, be dissolved: *Pillsworth v. Hopton*, 6 Ves. 51; *Smith v. Collyer*, 8 Id. 89; *Norway v. Rowe*, 19 Id. 147.

It is said, however, in one of the most respectable treatises on pleadings in chancery, that "pending an ejectment in a court of common law, a court of equity will restrain the tenant in possession from committing waste, by felling timber, plowing ancient meadow, or otherwise. Against this inconvenience a remedy at the common law was in many cases provided during the pendency of a real action by the writ of estrepement; and when the proceeding by ejectment became the usual mode of trying the title to land, as the writ of estrepement did not apply to the case, the courts of equity, proceeding on the same principles, supplied the defect." Mitf. Plea. 136. But the only authorities cited in support of what is here said are cases between landlord and tenant, where the title of the plaintiff had not been, and could not be, denied by the defendant, who confessedly held only as tenant: *Lalhropp v. Marsh*, 5 Ves. 259; *Pulleney v. Shelton*, 5 Id. 260, note; *Onslow v. —*, 16 Id. 173. Whence it is evident that there can be no means of preventing waste from being done upon real estate in England, pending a suit to determine the title, other than the writ of estrepement, and that writ, it is said, has fallen into disuse: 3 Black. Com. 227; *Galvert v. Gason*, 2 Sch. & Lefr. 561.

But in a variety of other cases the English court of chancery is in the habit of exercising its preventive and conservative powers for the express purpose of preserving the subject of

litigation from waste, injury, or total loss, pending the controversy.

In cases of patent rights, where the plaintiff is in possession of the invention, under color of title, an injunction may be granted pending the proceedings at law to try the right: *The Universities of Ox. & Cam. v. Richardson*, 6 Ves. 689. And so too where the plaintiff claims the copyright of a book, an injunction may be granted to prevent publication, during the continuance of a suit at law. In cases of copyright the jurisdiction is assumed merely for the purpose of making the legal right effectual, which can not be done by any action for damages, because if the work is pirated, it is impossible to lay before a jury the whole evidence as to all the publications, which go out to the world, to the plaintiff's prejudice; and, therefore, with a view to make the legal right effectual, the publication will be altogether prohibited. Where a fair doubt appears, as to the plaintiff's legal right, the court always directs it to be tried; making some provision, in the interim, the best that can be, for the benefit of both parties: *Hogg v. Kirby*, 8 Ves. 215; *Wilkins v. Aikin*, 17 Id. 422; *Rundell v. Murray*, Jac. Rep. 311; act of congress, fifteenth of February, 1819, ch. 19. And on a proper case being presented, the court will grant an injunction, and appoint a receiver to preserve personal property while a suit is depending in the ecclesiastical court, although an administration *pendente lite* might be there obtained: *Atkinson v. Henshaw*, 2 Ves. & Bea. 85. In general, where personal property, or the rents and profits of real estate in dispute, are in imminent danger of being wasted or lost, a receiver may be appointed to take care of it for the benefit of all concerned, pending the controversy: *Powell Mort.* 294, note. To accelerate the progress of the suit, as well as for the greater security of the fund, for the benefit of those who may ultimately appear to be entitled to it, money may be ordered to be brought into court where the defendant admits that he has it in his hands, and that he has no title to it: *Gordon v. Rothley*, 3 Ves. 572; *Freeman v. Fairlie*, 3 Meriv. 29. And there are many instances where the court interposes by injunction to secure the enjoyment of specific chattels; either because of their peculiar character, or because, from the nature of the property, it would be difficult or impossible for the plaintiff to have the full benefit of it, unless he could specifically enjoy it: *Fells v. Read*, 3 Ves. 71; *Lady Arundell v. Phipps*, 10 Id. 148.

Looking to the general reasoning and principles of those vari-

ous cases in which the English court of chancery interposes for the preservation of property, the right to which is in litigation, it does indeed seem strange that it has so pertinaciously refused an injunction to prevent irreparable mischief, and to put a stop to the further commission of waste upon real estate during the continuance of an action at law to try the right. It is admitted that there is no good reason why the court should not interfere in such cases. Should it turn out that the defendant had an unquestionable title, then the granting of such an injunction could only operate temporarily and partially to the prejudice of the free exercise of his right of property. But on the other hand, if it should be eventually shown that the plaintiff had the title, then, as the injunction turns no one out of possession nor displaces anything, it must necessarily leave to the defendant the advantage of fighting the plaintiff with his own property. Upon which, had not the injunction been granted, the most irretrievable destruction might have been perpetrated; acts of waste might have been committed which would deprive the plaintiff of the very substance of his inheritance, mischief might have been done which it would require years to repair; and things might have been torn away or destroyed which it would be difficult or impossible to restore in kind, such as the building, fixtures, trees, or other peculiarities about the estate, which a multitude of associated recollections had rendered precious to their owner; but as a compensation for the loss of which, a jury would not give one cent beyond their mere value. A man has a right to secure to himself a property even in his amusements; and it is not fit in any such cases to cast it to the estimation of people who may have not the least sympathy with the feelings of the owner, to set a value upon his privileges or his property: *Fells v. Read*, 3 Ves. 70; *Smith v. Collyer*, 8 Id. 89; *Berkely v. Brymer*, 9 Id. 356; *Lady Arundell v. Phipps*, 10 Id. 148; *Courthope v. Mapplesden*, Id. 291; *Lowther v. Lord Lowther*, 13 Id. 95; *Crockford v. Alexander*, 15 Id. 138; *Earl Cowper v. Baker*, 17 Id. 128; *Asley v. Welden*, 2 Bos. & P. 351; *Kimpton v. Eve*, 2 Ves. & Bea. 349.

The high court of chancery of Maryland has from the beginning, or certainly for a great length of time past, in this respect, acted more in harmony with its general principles than the court of chancery of England, by interposing to prevent waste and destruction in all cases during the continuance of a suit in which the title to the property has been or may be brought in question, as well where the subject of litigation was real estate, as

where it was mere perishable personalty, or money, or choses in action in the hands of the defendant. A similar and equally extensive application of the writ of injunction to stay waste, appears to have been made by the courts of chancery of Virginia and South Carolina: *Harris v. Thomas*, 1 Hen. & Munf. 18; *Shurbrick v. Guerard*, 2 Desau. 616. As I have before observed, there is sufficient evidence of the writ of estrepement having been at one time often resorted to in this state, although it has now fallen into total disuse. But even that writ must have been a very tardy and inadequate remedy compared with an injunction, which is the only judicial proceeding that seems to be in all respects capable, by its promptness and vigor, of preventing irreparable mischief from being done to real estate pending the litigation, by a provoked and desperate defendant.

When this mode of interposing by injunction to stay waste, pending an action at law or a bill in chancery, was first allowed by this court, I have not been able to distinctly ascertain, but it is evident that it had been considered as a settled course of proceeding under the provincial government; for upon an information in chancery, filed on the thirteenth of April, 1775, by the attorney-general, at the relation of Josias Bowen against Nicholas Norwood, to vacate a patent grant for a tract of land, it was alleged that the defendant in possession was committing great waste, to stay which, an injunction was asked and immediately granted until the final hearing: *The Attorney-general v. Norwood*. I have seen a case of this kind in which, in the year 1783, this form of a writ of injunction to stay waste pending an action of ejectment, appears to have been treated as then well established; and I have met with another instance in which an injunction was granted in the year 1803, apparently without hesitation, to stay waste until the final judgment in an action of ejectment. In which case, on its being urged that the defendant ought not to be thus deprived of the free use of his property, the court said that he had no other mode of relieving himself from the restriction than by pressing the action at law to a conclusion as speedily as possible: *Gillings v. Dew*. I have met with many other similar cases, but in no one of them does it appear that any objection had been made, grounded upon the principles of the English authorities, against the propriety of granting or continuing the injunction, because the plaintiff had stated that his title was disputed, or because the defendant had positively denied its validity. And so, too, in cases of nuisance, although it is necessary in England that the individuals complaining of the

injury should have had their rights first established at law: Mitf. Plea. 144; yet here, where an action or the proper proceeding has been instituted to try the right, an injunction may be granted to prevent the repetition or further continuance of the nuisance until the right has been thus determined at law or in the regular mode: *Williamson v. Carnan*, 1 G. & J. 184.

The writ of injunction in cases of this kind to stay waste, pending a suit to try the right, has, in Maryland, taken the place and performs the office, in all respects, of the ancient writ of estrepement. It is an injunction not founded on any privity of title or contract whatever; it is an attendant upon, and an auxiliary of, the action at common law, or the suit in this court in which the title has been or may be drawn in question; it follows and shares the fate of that suit, and can not be dissolved upon an answer, in any way denying the plaintiff's title, until that suit has been fully determined in favor of the defendant. Like an estrepement, its restrictions do not extend to an inhibition of any ordinary use of the land by the occupying tenant, for he is allowed to cultivate it as usual, and to take wood for fuel, repairing of houses, for fencing and the like, so he does no waste or destruction to the inheritance.

It must, however, be recollected that there is no instance of this court's ever having interposed by an injunction to prevent a mere trespass, not instant and irreparable, where no suit has been instituted, here or in a court of common law, involving the title; for, against the granting of such an injunction, which does not operate as an auxiliary to a suit to try the right, the same reasons apply here as in England. It does not fall within the jurisdiction of a court of equity to try the validity of mere legal titles; for all such purposes recourse must be had to the ordinary tribunals of the common law. A person can only come here to obtain the interposition of the conservative powers of this court in cases where the common law remedies are inadequate or to which they do not at all apply. If the plaintiff's title is denied, and he acquiesces in the denial by refusing to bring an action at law to have it authenticated and sustained, he can have no ground to ask any relief of this court founded on a claim which he himself thus shrinks from having judicially investigated, or put into a course of being legally established.

In conclusion, I deem it proper to remark that this mode of applying for this injunction by a separate bill, was irregular and improper; it should have been asked for by a petition, filed in this case, without praying for a subpoena to bring in defend-

ants who were already before the court. The urgency of the case may be some excuse for the irregularity; but I shall in all cases, as far as practicable, require parties to pursue the regular and proper course: Eden, Inj. 209; Anonymous, 1 Ves. jun. 93; *Calvert v. Gason*, 2 Sch. & Lefr. 561; *Coale v. Garretson*, 1 Bland's Ch. 581, note. In this instance, however, the injunction seems to have been extended rather beyond the bounds of the case presented by the bill itself; as to so much, therefore, it will be dissolved, or rather circumscribed within its proper limits.

Whereupon it is ordered that the injunction heretofore granted in this case, in so far as it prohibits the removal of any timber or wood which had been cut and severed from the land prior to the service thereof; and also from cutting and taking away timber or wood necessary for the repairs of buildings or fences, and for the use or proper cultivation of the land, be and the same is hereby dissolved; and that in all other respects the same be and is hereby continued until the final hearing or further order.

Upon the subsequent hearing on the merits the following opinion was delivered:

BLAND, Chancellor. This case, standing ready for hearing, and having been submitted on the notes of the defendants' solicitor, and no one appearing on behalf of the plaintiff before the end of the sittings of the term according to the rules of the court, the proceedings were read and considered.

Samuel Peach, having obtained a judgment at law, in Prince George's county court, against this defendant, Nathan Waters, sued out a *fieri facias*, which was levied on certain parcels of land as his property; whereupon the sheriff, at April term, 1827, of that court, made a return in the following words: "Made by sale to Doctor Charles Duvall, on the thirtieth day of December, eighteen hundred and twenty-six, of all the interest of the defendant in and to the following parcels of land, to wit: one tract of land called Pastures Enlarged, containing two hundred acres, more or less; one tract of land called Osbourne's lot and part of Pleasant Grove, containing fifty-two acres, more or less; one tract of land called Duvall's Pleasure, or part of Duvall's Pleasure, containing one hundred and fifty acres, more or less; one tract of land called Teukesbury, and a part of Teukesbury and Walker's Delight, containing one hundred and fifty acres, more or less; and a tract of land called Friendship, containing one hundred and eighty acres, the

sum of thirteen hundred and fifty dollars, which has been paid to me by the said Charles Duvall, and by me paid to the plaintiff's attorney."

This return constitutes the commencement of the title of the plaintiff upon which he rests his pretensions. He alleges that the defendant, Nathan Waters, by a deed bearing date on the seventeenth of February, 1824, conveyed the lands mentioned in this return to Nathan I. Waters, and Samuel Ratcliff; and that Ratcliff had conveyed a part of the same lands to Nathan I. Waters, by a deed bearing date on the twenty-ninth of August, 1825; and that these deeds were made without valuable consideration, and are fraudulent and void. Whereupon he prayed that they might be set aside and annulled as against him.

The defendants by their answer alleged that the deeds were made *bona fide*, for a valuable consideration, and they objected that the return of the sheriff was so defective that it could give to the plaintiff no title whatever.

If these deeds are really valid, as the defendants contend, there is an end of the matter, since it can not be necessary to inquire into the correctness of the return for any other purpose than to ascertain how far it is available as passing the property of Nathan Waters, which alone was liable to be seized and sold under the *feri facias*.

The first question, then, is whether those deeds were *bona fide* and valid transactions or not. The deed of the seventeenth of February, 1824, which is the principal one, carries upon its face that which is calculated to awaken suspicion. It deals in comprehensive generalities. Such and such tracts or parcels of land by name, without any particular specification of locations or boundaries; and all the furniture and plantation utensils, without any schedule of them, are conveyed to the grantees. There is certainly nothing absolutely illegal in this mode of conveying property; but real sellers and purchasers do not commonly deal so loosely. There is usually some other security required than the purchaser's own bond merely for so large an amount of purchase-money as nine thousand one hundred and fifty dollars in return for an absolute deed of this kind; and the purchaser, too, in most cases, is not content with anything short of a precise and unequivocal description of the property he has bought, and intends honestly to pay for. At the time this deed of the seventeenth of February, 1824, was made, the defendant, Nathan Waters, who lived upon this land, had one son and five or six daughters, all of whom were more or less dependent

upon him. He was in embarrassed circumstances. His younger daughters lived with him, and his son also was an inmate of his house, and occasionally worked with him at his trade of a millwright; but it is somewhat doubtful whether his son was then of full age or not; the witnesses differ about the fact. Samuel Ratcliff, William Beck, and Philemon Jones, with their wives, who were his daughters, also lived upon this land, and derived their subsistence from it. After the date of the conveyance of the seventeenth of February, 1824, to Nathan I. Waters, the son, and Samuel Ratcliff, the son-in-law, Nathan Waters continued to hold possession of the land, claiming it as his own, and exercising many unequivocal acts of ownership over it; he sold timber off it; he rented parcels of it, and gave receipts for the rent as due to himself; and he once drove from it his son; who, as well as Ratcliff, admitted, after the date of the deed, that they had no right to it. There is no clear, unsuspicious proof that either Nathan I. Waters or Samuel Ratcliff ever paid to Nathan Waters anything whatever for this land. The one, as his son, and the other, as the husband of one of his daughters, no doubt had his confidence, and shared his best affections; and the more so as they were both poor, and had no way of accumulating large sums of money.

In short, it is clear, from all the circumstances of this case, that this deed of the seventeenth of February, 1824, was, in truth, made, as Nathan Waters himself declared to one of the witnesses, merely "for the purpose of protecting his property until he could pay his debts," and that it was a conveyance contrived with the express intent to defraud his creditors; or, as it is declared in the strong language of the venerable statute of 1570, "not only to the let or hindrance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, bargaining, and chevisance between man and man:" 13 Eliz., c. 5. I shall, therefore, pronounce both these deeds, for the second must follow the fate of the first, to be utterly void, as against this plaintiff, if his claim under the return be a sound one.

The next inquiry, therefore, is as to the validity of the plaintiff's claim. The property in question was sold by the sheriff under and by virtue of a writ of *fieri facias* issued on a judgment obtained in an action at common law by Samuel Peach against this defendant, Nathan Waters; and this plaintiff makes title as the purchaser at that sale. But these defendants object that the description of the lands as given by the sheriff in his

return to the *feri facias*, is so vague and uncertain as to convey no valid title to the plaintiff as purchaser. What degree of certainty in the specification of the land taken and sold is necessary to be given by the sheriff, in his return to the *feri facias*, under which the levy was made, is a question of importance, and deserves to be carefully considered.

By the common law, land was not liable to be taken in an execution and sold for the payment of debts. Under *feri facias*, nothing, according to the common law, could be taken but chattels, movable property, the industrial fruits of the earth then growing, such as corn, wheat, etc., or leases for years, of which the writ commanded the sheriff to levy the debt, by a sale, converting them into money. The sale of all personal property, passing the right without any more solemn act than a mere delivery; a sale and delivery, by the sheriff of such property, was held to be sufficient in all cases to vest a complete and absolute title in the purchaser, without any particular specification of the thing thus taken and sold. It was, therefore, unnecessary for the sheriff to make any return of a *feri facias*, either for his own justification, or as an evidence of the title of the purchaser of the goods; although the sheriff might be required to make return of such an execution, so as to compel him to show what he had done towards levying the debt as commanded, and so as to enable the plaintiff, if necessary, to proceed further against the defendant for the recovery of the whole or the residue of his claim: Com. Dig., tit. Execution, c. 7.

By an English statute passed in the year 1285, West. 2, c. 18, lands were partially subjected to be taken in execution under an *elegit*, and held until the debt should be levied upon a reasonable price or extent: 2 Inst. 394. This statute having, however, prescribed no mode of proceeding, nor required of the sheriff any return of the execution, it was held that what was a reasonable price or extent could only be ascertained by a jury; which inquisition by a jury, it was also held, the sheriff was bound to take and return; because it materially affected the title to the inheritance; and because, where an inquisition was thus required, it was fit and proper that it should be returned to enable the court to judge of its sufficiency and of the propriety of its being placed upon the same record with the judgment to which it was the sequel. And hence it became the established law that all writs of *elegit*, under the statutes, should be returned; and that the inquisition and return should be filed as a part of the record of the case. Whence it is evi-

dent that a title by elegit must be thus put in writing and recorded: 2 Inst. 396; Dyer, ca. 71, fol. 100; *Fulwood's case*, 4 Co. 67; *Palmer's case*, Id. 74; *Hoe's case*, 5 Id. 90; *Underhill v. Devereux*, 2 Saund. 69, note 2.

This had been introduced as the law of Maryland, and was in regular and constant operation: Kilty's Rep. 144, where it was declared by a British statute passed in the year 1732: 5 Geo. II, c. 7, that real estates situate in the plantations, belonging to any person indebted, should be subject to the like process for selling and disposing of the same towards the satisfaction of debts as personal estate. This British statute appears to have been first introduced as the law of Maryland about the year 1740: *Davidson's Lessee v. Beatty*, 3 H. & McH. 612. This statute, however, specified no mode of judicial proceeding, nor designated any form of execution, but, like the previous English statute, under which the proceeding by elegit had been framed, it merely declared the rule, leaving its application to be made by the courts of justice in such a manner and form as they deemed best.

In Maryland, for the purpose of executing and conforming to this British statute, the writ of *fiery facias* was so altered as to command that the debt should be levied of "the lands and tenements" as well as of the goods and chattels of the defendant. And as an English statute, passed in the year 1676: 29 Car. II, c. 3, sec. 3, and which had then been adopted here, had declared that no estate nor interest in lands, exceeding the term of three years, should be assigned or granted unless by deed or note in writing; and as the acts of assembly required all conveyances of any estate for above seven years, in lands, to be in writing and recorded: 1715, c. 47, it seems to have been always considered and held, that although the title to land, as in case of a levy of the *fiery facias* upon personalty, passed by the sale made by the sheriff, yet some written evidence of the sale was necessary, that such evidence should be recorded. Hence, although no inquisition was required as under the English statute giving the elegit; yet, it seems to have been always understood, that in all cases where real estate was levied upon and sold, it was necessary, as an evidence of the title which had been so passed by the sale, that the *fiery facias* should be returned; that the sheriff should specify with sufficient certainty in his return the real estate which he had so sold, and that the return so made by him should be

recorded: *Bull v. Sheredine*, 1 H. & J. 410; *Boring v. Lemmon*, 5 Id. 223; *Barney v. Patterson*, 6 Id. 204.

Upon these general principles it has been laid down that a return of a sale of lands under a *fiery facias* should regularly, for the security of purchasers, describe the premises with precision; but it is enough if the description be such as that the property sold may be clearly identified, or sufficiently known and ascertained. It is not necessary that it should be specified with technical minuteness. Thus, if the land be described as "one tract of land called Habitation Rock, containing three hundred and sixty acres, more or less, situate in the North Hundred Baltimore county:" *Boring v. Lemmon*, 5 H. & J. 223; or as "all the part of the tract of land called Charles and Benjamin, which was devised to E. D. B. by his father R. B.:" *Berry v. Griffith*, 2 H. & J. 337; or by a particular name, as "a tract of land called Borough Hall, containing the supposed quantity of one hundred and thirty acres of land, more or less:" *Thomas' Lessees v. Turvey*, 1 H. & G. 435, it is sufficient; because the sheriff, not having the title deeds within his reach, can not be presumed to have it in his power to give a more particular description of the land he sells: *Barney v. Patterson*, 6 H. & J. 204; *Scott v. Bruce*, 2 Id. 262; *Berry v. Griffith*, Id. 337; *Underhill v. Devereux*, 2 Saund. 68, f. But where it was designated by names common to all similar property, as thus, "to dwelling-house, gristmill, sawmill, and fulling mill, and all other buildings belonging thereunto, with one hundred acres of land joining the said property," the return was held to be defective for want of a specification: *Williamson v. Perkins*, 1 H. & J. 449; *McElderry v. Smith*, 2 Id. 72; *Fitzhugh v. Hellen*, 3 Id. 206. And so, too, where the return described the land as "part of Resurrection Manor, containing two hundred and fifty-one acres, more or less;" it was held to be void for uncertainty, because there was nothing by which it could be ascertained whether that part was to be located on the north, south, east, or west of the whole tract. But in this latter it was admitted that the return would have been good if it had designated a whole tract by any distinct name or description, such as a tract of land called part of a tract; and not as a tract of land being part of a tract called Resurrection Manor: *Fenwick v. Floyd*, 1 H. & G. 172; *Purl's Lessee v. Duvall*, 5 H. & J. 69 [9 Am. Dec. 490]; *Waters v. Duvall*, 6 G. & J. 76.

According to these decisions and principles, the return under consideration must be deemed sufficient when taken either

altogether or in its several parts. The property sold is described as consisting of several parcels of land. First, of "one tract of land called the Pastures Enlarged." About this there can be no doubt. Secondly, of "one tract of land called Osbourne's lot, and part of Pleasant Grove." This is a designation of one entire tract of land of such a name. It is not, as seems to have been supposed, a sale of an uncertain part of a tract of land called "Pleasant Grove;" and, therefore, the description of this parcel also is sufficiently certain. Thirdly, of "one tract of land called Duvall's Pleasure, or part of Duvall's Pleasure." This is a designation of one whole tract having the one or the other of two names, and is, therefore, a sufficient description. Fourthly, of "one tract of land called Teukesbury, and a part of Teukesbury and Walker's Delight." This description also clearly refers to and designates one parcel of land as a whole, and not as a part of a tract. And lastly, of "a tract of land called Friendship." This description is confessedly sufficient.

Hence, it clearly follows that as this return is sufficiently descriptive in its several parts, it must be so considered as a whole, and when taken altogether. Consequently, this plaintiff, who has been thus returned as the purchaser, has thereby obtained such a valid right to the lands held by the defendant, Nathan Waters, as entitles him to have the fraudulent deeds complained of set aside, so far as they at all interfere with his claim.

Whereupon it is decreed that the said deed bearing date on the seventeenth day of February, 1824, and also the deed bearing date on the twenty-ninth day of August, 1825, and the records thereof, be and the same are hereby set aside, and declared and directed to be held, deemed, and taken to be utterly null and void to all intents and purposes whatever, so far as the same may interfere with, or in any manner affect, the right and claim of the said plaintiff, Charles Duvall, unto the several parcels of land specified in the said return to the said writ of *fieri facias*, by which it appears he became the purchaser thereof, as in the proceedings mentioned.

INJUNCTION AGAINST WASTE.—See, on this subject, *Watson v. Hunter*, 9 Am. Dec. 295. As to what constitutes waste, see *Ward v. Sheppard*, 2 Am. Dec. 625; *Findlay v. Smith*, 8 Id. 733; *Wilds v. Layton*, 12 Id. 91. As to who may maintain an action for waste, see *Hughlett v. Harris*, 12 Am. Dec. 104.

INJUNCTION AGAINST TRESPASS.—For an extended discussion of this subject, see *Jerome v. Ross*, 11 Am. Dec. 484, and the note to that case.

THAT LANDS AT COMMON LAW COULD NOT BE SEIZED and sold on execution, see *Jones v. Jones*, *ante*.

C A S E S
IN THE
SUPREME COURT OF JUDICATURE
OF
NEW JERSEY.

DEN EX DEM. ELIZA HARDENBERGH *v.* JACOB R.
HARDENBERGH.

[5 HALSTED, 42.]

- A CONVEYANCE TO HUSBAND AND WIFE, made after their marriage, makes them tenants of the entirety, and not joint tenants.
- A GRANT TO A HUSBAND AND WIFE AND A THIRD PERSON vests in the husband and wife an undivided one half, as tenants by entirety, and the other half in such third person.
- A TENANCY BY ENTIRETIES CAN NOT BE SEVERED by the act of either the husband or wife, nor by a fine or common recovery against either of the spouses, nor can partition be made of an estate held by such tenancy.
- THE SURVIVOR OF A TENANCY BY ENTIRETIES enjoys and is vested with the title to the whole property, not because any new or farther interest or estate becomes vested upon the death of his co-tenant, but because the original conveyance vested each grantee with the entirety.
- A CONVEYANCE TO A MAN AND WOMAN THEN UNMARRIED vests an estate in them as joint tenants, or as tenants in common, and this estate will not be changed by their subsequent marriage.
- A STATUTE ENACTING "That no estate shall be considered and adjudged to be an estate in joint tenancy, except it be expressly set forth in the grant creating such estate," etc., does not apply to conveyances or devises to a husband or wife, because they do not hold in joint tenancy, but as tenants of the entirety.

THIS was an ejectment. The facts are sufficiently stated in the opinions of the judges.

Wood, for the plaintiff; and

C. L. Hardenbergh, for defendants.

EWING, C. J. By deed of bargain and sale, bearing date on the thirty-first day of August, 1822, and made "between William McKnight and Nancy, his wife, of the county of Burling-

ton and state of New Jersey, of the first part, and James Hardenbergh, and Elizabeth, his wife, of the township of South Amboy, county of Middlesex and state of New Jersey, of the second part," the words, and Elizabeth, his wife, having been interlined after the deed was drawn, and before it was executed, "the party of the first part" granted, bargained, and sold "unto the said party of the second part, his heirs and assigns, forever," a lot of land in the township of South Amboy, being the premises in question, to have and to hold "unto him, the said party of the second part, his heirs and assigns, to the only proper use, benefit, and behoof of him, the said party of the second part, his heirs and assigns, forever." Under this conveyance James Hardenbergh went into possession of the premises, built a house and made other improvements, and continued in possession until his decease. He died without issue. His wife, the lessor of the plaintiff and one of the grantees in the deed, survived him and continued in possession of the premises for six months after his decease, at which time the defendant, who is the father of James Hardenbergh, entered and continued, by his tenant, in possession at the commencement of this action.

The lessor of the plaintiff claims the whole premises, under the above-mentioned deed, and insists that she is entitled thereby to an estate in fee simple.

The counsel of the defendant, in the brief submitted to us, insists that the wife, by force of the deed, "takes a joint estate with her husband for life, and then it goes over to his heirs in fee simple; a joint estate for life with remainder in fee to the husband, a well known estate in the law;" and, for example, he refers to the 285th, 2 Littleton, which is in these words: "If lands be given to two, and to the heirs of one of them, this is a good jointure, and the one hath a freehold and the other a fee simple." To which Littleton adds: "If he which hath the fee dieth, he which hath the freehold shall have the entirety, by survivor, for term of his life." And Coke, in his comment, says: "They are joint tenants for life, and the fee simple is one of them."

The counsel of the defendant farther insists that "if the deed should be construed according to the claims of the plaintiff, still, by force of our statute, Rev. Laws, 556, the lessor of the plaintiff and her husband were tenants in common."

It is manifestly unnecessary for us, in order to decide this cause, to inquire or determine whether the lessor of the plaintiff takes under the deed an estate for life, or an estate in fee

simple; because if, as the defendant insists, she took only an estate for life, and by virtue of our statute, as a tenant in common, the plaintiff, her life estate of one moiety subsisting, must be entitled in this action to judgment, to recover one moiety of the premises.

Inasmuch, however, as the plaintiff demands the whole premises, although to ascertain the duration of the estate of the lessor is not essential, yet the operation and extent of the statute respecting joint tenants and tenants in common must be examined, because thereon depends the question whether the plaintiff is to recover the entirety or only a moiety.

Properly to understand the statute, and safely and truly to construe it, we must first distinctly comprehend the nature of the estate which passes to husband and wife by a grant made to them during coverture.

A conveyance of lands to a man and his wife, made after their intermarriage, creates and vests in them an estate of a very peculiar nature, resulting from that intimate union, by which, as Blackstone says, "the very being or legal existence of the woman is suspended during the marriage, or, at least, is incorporated and consolidated into that of the husband." The estate, correctly speaking, is not what is known in the law by the name joint-tenancy. The husband and wife are not joint-tenants. I am aware that sometimes, and by high authority too, but *currente calamo* and improperly, as will, I think, be presently seen, the estate has been thus denominated. In respect, however, to the name only, not to the nature of the estate, is any diversity to be found. The latter has been viewed in the same light as far back as our books yield us the means of research. The very name joint-tenants implies a plurality of persons. It can not then aptly describe husband and wife, nor correctly apply to the estate vested in them; for in contemplation of law they are one person: Littleton, sec. 291 (665). Of an estate in joint-tenancy, each of the owners has an undivided moiety or other proportional part of the whole premises, each a moiety if there are only two owners, and if more than two, each his relative proportion. They take and hold by moieties or other proportional parts; in technical language, they are seized *per my et per tout*. Of husband and wife, both have not an undivided moiety, but the entirety. They take and hold, not by moieties, but each the entirety. Each is not seised of an undivided moiety, but both are, and each is seised of the whole. They are seised, not *per my et per tout*, but solely and simply *per tout*. The same

words of conveyance, which make two other persons joint-tenants, will make as husband and wife tenants of the entirety: Lit., sec. 665; 2 Lev. 107; Ambler, 649; Moor, 210; 2 Bl. Rep. 1214; 5 T. R. 564, 568; Vesey, 199; 5 Johns. Ch. 437; 2 Kent's Com. 112. In a grant by way of joint-tenancy, to three persons, each takes one third part. In a grant to a husband and wife, and a third person, the husband and wife take one half, and the other person takes the other half; and if there be two other persons, the husband and wife take one-third, and each of the others one third: Lit., sec. 291. In joint-tenancy, either of the owners may, at his pleasure, dispose of his share, and convey it to a stranger, who will hold undivided, and in common with the other owner. Not so with husband and wife. Neither of them can separately, or without the assent of the other, dispose of or convey away any part. It has even been held, where the estate was granted to a man and his wife, and to the heirs of the body of the husband, that he could not, during the life of the wife, dispose of the premises by a common recovery, so as to destroy the entail; nor did his surviving his wife give force or efficacy to the recovery: 3 Co. 5; Moor, 210; 9 Co. 140; 2 Vern. 120; Prec. Ch. 1; 2 Bl. Rep. 1214; Roper on Husband and Wife, 51. A severance of a joint-tenancy may be made, and the estate thereby turned into a tenancy in common by any one of the joint owners at his will. Of the estate of husband and wife, there can be no severance: 3 Co. 5; 2 Bl. Rep. 1213. It has been held that a fine or common recovery by the husband, during the marriage, will work a severance, if the estate was granted to him and her before marriage, but if granted after marriage, no severance will thereby be wrought: Ambler, 649. Joint-tenants may make partition among them of their lands, after which each will hold in severalty. Of the estate of husband and wife, partition can not be made. The treason of a husband does not destroy the estate of a wife. In an estate held in joint-tenancy, the peculiar and distinguishing characteristic is the right of survivorship, whereby, on the decease of one tenant, his companion becomes entitled to the whole estates. Between husband and wife the *jus accrescendi* does not exist.

The surviving joint-tenant takes something by way of accretion or addition to his interest, gains something he previously had not, the undivided moiety which belonged to the deceased. The survivor of husband and wife has no increase of estate or interest by the decease, having before the entirety been previously seised of the whole. The survivor, it is true, enjoys the

whole, but not because any new or farther estate or interest becomes vested, but because of the original conveyance, and of the same estate and same quantity of estate as at the time the conveyance was perfected. In the remarks I have made, it will have been observed, that the estate granted to husband and wife during marriage, has been the subject of examination. If lands be granted to a man and woman and their heirs, and afterward they marry, they remain, as they previously were, joint-tenants; they have moieties between them; as they originally took by moieties, they will continue to hold by moieties after the marriage, and the doctrine of alienation, severance, partition, and of the *jus accrescendi* may apply: Co. Lit. 187, b.; 2 Lev. 107; Ambler, 649. And to this kind of estate Bacon may allude in the passage cited by the defendant's counsel: 3 Bac. Abr., tit. Joint Tenants, B.: "Baron and *feme* may be joint-tenants;" or more probably, judging from the context, he means to lay down the doctrine that they may hold an estate in joint-tenancy with another person; for, unless used in one of these senses, the clause is unsupported by the authority cited in the margin, and differs from the succeeding passages on the same page.

Having brought to our view the nature of the estate of husband and wife, we may proceed to ascertain the applicability of the statute, respecting joint-tenants and tenants in common, to the case before us.

It is enacted "that no estate shall be considered and adjudged to be an estate in joint-tenancy, except it be expressly set forth in the grant or devise creating such estate, that it is the intention of the parties to create an estate in joint-tenancy and not an estate of tenancy in common." But we have seen that the deed of James Hardenbergh and wife would not, anterior to that statute, have created an estate in joint-tenancy; that the estate created thereby would not have been considered or adjudged to be of that class. It follows, then, that it is not of that nature on which the statute was designed to operate. But the counsel of the defendant appeals very properly to the preamble and to the light which may be thence shed on the intention of the legislature. It is in these words: "Whereas, estates granted or devised to a plurality of persons without any restrictive, exclusive or explanatory words, have heretofore been held in this state to be estates in joint-tenancy, therefore be it enacted." The very same class of cases here, as in the enacting clause, is plainly designated; such as had been held to be estates in joint-tenancy. Moreover, the preamble mentions estates

granted to a plurality of persons. But husband and wife, in contemplation of law, are one person, not a plurality. We shall be the more satisfied with this construction if we recur to the causes which induced the legislature to enact this law. The hardship, surprise, and unanticipated consequences of the doctrine of survivorship can rarely, if indeed ever, be felt in the case of husband and wife.

This statute, then, does not operate on the deed before us. It is subject to the principles of the common law; and by them the wife is entitled, the husband being dead, to the possession of the whole premises.

In the case of *Shaw v. Hearsey*, 5 Mass. 521, the supreme court of Massachusetts held that the statute of that state did not extend to conveyances to husband and wife, a statute substantially like ours, with this difference, indeed, that the words "conveyances and devises to two or more persons," are there actually contained in the enacting clause, as the counsel of the defendant proposed to read them in our statute for greater elucidation. In New York they have a similar statutory provision; and in the cases of *Jackson v. Stevens*, 16 Johns. 115, and *Jackson v. Carey*, Id. 305, the supreme court decided that it did not extend to the case of husband and wife, and because their estate was not a joint-tenancy. It is true, as remarked by the defendant's counsel, their statute has no such preamble. But hence I apprehend their cases are entitled to more, not less, consideration. The preamble makes the scope of our statute more clear. In the state of Virginia a similar decision has been made in the case of *Thornton v. Thornton*, reported in 3 Randolph, 179, although the words of the Virginia statute, "of whatever kind the estates, or thing holden or possessed be," are much more favorable to such a construction as the counsel of the defendant has sought to establish for our statute.

Upon the whole, I am of opinion the plaintiff is entitled to recover the whole premises in controversy.

DRAKE, J. This case turns upon the construction of the deed conveying the premises in question. It is made "between William McKnight, and Nancy, his wife, of the first part; and James Hardenbergh, and Eliza, his wife, of the second part;" and grants, bargains, and sells "to the said party of the second part, his heirs and assigns," the lands and tenements in controversy.

The said James Hardenbergh took possession of the premises, made expensive improvements, and died there without issue,

leaving the said Eliza, his wife, the lessor of the plaintiff, in possession, which she held about six months, when the defendant, Jacob R. Hardenbergh took possession, and still holds the same by his tenant, John Appleby.

The grantees are "the party of the second part," that is, James Hardenbergh, and Eliza, his wife, "his heirs and assigns." The term party, embraces both grantees, and is used for that purpose with strict grammatical accuracy; and the word his, is as definite in its reference to only one of them. More formally expressed, this grant would read, to the said James Hardenbergh, and Eliza, his wife, and to the heirs and assigns of the said James Hardenbergh. In Coke on Littleton, sec. 285, it is said: "If lands be given to two, and to the heirs of one of them, this is a good jointure, and the one hath a freehold, and the other a fee-simple; and if he which hath the fee dieth, he which hath the freehold shall have the entirety by survivor for term of his life:" See, also, 2 Cruise, 510, 511. But the grantees were husband and wife: "upon a purchase made by them both, each has the entirety, and they are seised *per tout*, and not *per my*." This principle can not have any operation in this case, upon the principles of the common law, for with it, or without it, Eliza Hardenbergh, having survived her husband, would be entitled to a life estate in the whole premises.

The only remaining question is, how far the common law, as applicable to this case, is varied by the statute: Revised Laws, 556. Under the operation of which the plaintiff's right of recovery would be reduced to one half the premises. My doubts on this point have been removed by the view of it taken in the opinion of the chief justice, and I concur with him that the plaintiff is entitled to recover the whole premises.

TENANCY BY ENTIRETIES—DEFINITIONS.—"An estate by entireties arises on a gift to two persons being, at the time the gift takes effect, husband and wife:" Jickling on Anal. L. and Eq. Estates, 252. "A tenancy by entireties is peculiar," says Mr. Preston, "to a gift to two persons being, at the time the gift takes effect, husband and wife:" 2 Preston on Abstracts of Title, 39. The same author, in his work on estates, gives a more complete definition; "Tenancy by entireties is when the husband and wife take an estate to themselves jointly, by grant or devise, or limitation of use, made to them by coverture, or by grant, etc., to them, which is *in fieri* at the time of their marriage, and completed by livery of seisin or attornment during the coverture." "The husband and wife have not either a joint estate, a sole or several estate, nor even an estate in common. From the unity of their persons by marriage they have the estate entirely as one individual, and on the death of one of them the entire tenement will, for all the estate of which they are seised in this manner, belong to the survivor without the power of alienation or for-

feiture of either alone, to prejudice the right of the other." 1 Preston on Estates, 131. Why the two celebrated and very accurate writers from whose works the preceding quotations have been made, ever spoke of an estate by entireties, as though its only origin was by gift, is altogether unaccountable. Mr. Jickling, on the very next page after giving the definition first quoted, speaks of estates acquired by husband and wife on a purchase by them both, evidently using the word *purchase* in a sense which did not include, or at least was not limited to, the idea of a gift. And certainly, of the many cases upon this subject to be found in the reports, not one implies that this estate is necessarily founded upon a gift. A tenancy by entireties arises whenever an estate vests in two persons, they being, when it so vests, husband and wife. In this description of tenancy by entirety, we have excluded the idea that the tenancy must be created by gift or purchase. Though not ordinarily acquired by descent, this is so only because husband and wife rarely succeed to property as heirs of the same person. But, on so acquiring it, they are tenants by entireties: *Gillan v. Dixon*, 65 Pa. St. 395. It is not essential that they should be married when the gift or grant is made if, thereafter, when it vests, they are husband and wife. Hence, if a devise be made to a man and woman, and before the death of the testator they marry, or if a feoffment be made to them while they are single, of which livery is made after marriage; or if they recover on a voucher to warranty annexed to an estate of which they were joint tenants, in all these cases they take by entireties: Jickling Anal. L. & Eq. Estates, 252; Co. Lit. 187; *Nicholls v. Nicholls*, cited Vin. Abr. Baron & Feme; Plowd. Comm. 483.

DIFFERENCE BETWEEN JOINT-TENANCY AND AN ESTATE BY ENTIRETY.—A joint-tenancy distinguished by four unities; a tenancy by entirety, by five: *Topping v. Sadler*, 5 Jones, 357. The former may be vested in any number of natural persons more than two; the latter can be vested in but two natural persons, and these two are regarded as but one in law. Joint-tenants take by moieties; each is seised of an undivided moiety of the whole, husband and wife take each an entirety, and are seised *per tout* but not *per my*. Joint-tenants may each alien his interest in the estate; husband and wife must alienate jointly. The former may sever their estates at pleasure; the latter hold an estate which, while it remains theirs, is inseverable. The former can have partition; but the latter can not, unless indeed in a divorce proceeding severing their matrimonial relations. The former may succeed to his co-tenant's moiety by right of survivorship, while upon the decease of either of the spouses, the other continues holding the entire estate: *Doe v. Garrison*, 1 Dana, 35; *Shaw v. Hearsey*, 5 Mass. 521; *Hemingway v. Scales*, 42 Miss. 1; 2 A. R. 586; *Taul v. Campbell*, 7 Yerg. 333. "A conveyance to husband and wife creates neither a tenancy in common nor a joint-tenancy. The estate of joint-tenants is a unit made of divisible parts; that of husband and wife is also a unit, but it is made up of indivisible parts. In the first case, there are several holders of different moieties or portions, and upon the death of either the survivor takes a new estate. He acquires by survivorship the moiety of his deceased co-tenant. In the last case, though there are two natural persons, they are but one person in law, and upon the death of either, the survivor takes no new estate. It is a mere change in the legal properties of the person holding, and not an alteration in the estate holden. The loss of an adjunct merely reduces the legal personage holding the estate to an individuality identical with the natural person. The whole estate continues in the survivor the same as it would continue in a corporation after the death of one of the corporators. This has been the settled law

for centuries:" *Stuckey v. Kerfe's Ex'rs*, 26 Pa. St. 399; *Gibson v. Zimmerman*, 12 Mo. 385; *Simpson v. Pearson*, 31 Ind. 1. As tenancy by entirety is not noticed as a distinct tenancy in many standard works upon the common law, it may be insisted that it is but a species of joint-tenancy. The differences between the two already pointed out, it seems to us, conclusively establish that they must be classified as independent cotenancies. But if our theory needs any further support, this support is found in the fact that all the English adjudications upon this subject, as well as all the early writers upon the common law, assert that husband and wife can not, by any words of limitation, however well chosen for that purpose, receive an estate as joint tenants: Freeman on Cotenancy and Partition, sec. 71. This position is assailed by Mr. Putnam in 4 South L. R., N. S. 93. Mr. Ram, in his Outline of the Law of Tenancy and Tenure, treats of tenancy by entirety as a separate species of tenancy, but he thus undertakes to prove that husband and wife are not tenants by entireties, but joint tenants: "The position has been hazarded that husband and wife, tenants by entireties, are joint tenants. It should be observed, however, that this appears contrary to a received notion of tenancy by entireties, and this idea is sanctioned by the concurrence of opinion of writers of the first eminence. But that tenants by entireties are joint tenants may be thought to follow from a consideration of the following points, in which the common joint tenancy and a tenancy by entireties have a perfect agreement. If A. grants to B. and C. one hundred acres in joint tenancy, he conveys to B. and C. to hold jointly. If A. grants to D., and E., his wife, one hundred acres (not to hold in common), he conveys to D., and E., his wife, jointly. B. is a tenant and C. is a tenant. So, it is apprehended, D. is a tenant and E. tenant, B. and C. are joint tenants to the *præcipe*. D. and E. are jointly tenants to the *præcipe*. Survivorship takes place between B. and C. Survivorship takes place between D. and E. In these points there appears not a shade of difference between the tenancy of B. and C. and the tenancy of D., and E., his wife. B. and C. are joint tenants, then why not D. and E.? That which distinguishes a tenancy by entireties from a common joint tenancy is this: that tenancies by entireties are not seised *per my*; does it follow that they are not joint tenants? The common joint tenants are seised *per my*, but would they be less joint tenants if not seised *per my*? What is it that constitutes a joint tenancy? A joint seisin *per tout*. It is not a seisin *per my* which makes a joint tenancy. Without that the common joint tenants would be still joint tenants. Because tenants by entireties are not seised *per my*, is surely no reason to make them not joint tenants. A learned writer says, tenants by entireties have not either a joint estate, a sole or several estate, nor even an estate in common. With great submission it may be contended that the joint estate is precisely the estate which they have. The estate of tenants by entireties is more a joint estate than the estate of common joint tenants; for whereas the common joint tenants are seised *per my et per tout*, tenants by entireties are seised *per tout* only. If tenants *per my et per tout* have a joint estate, *a fortiori* tenants *per tout* have." After thus reasoning to demonstrate that husband and wife are joint tenants, Mr. Ram argues that they are not tenants by entireties, because if they are to be regarded as one person in law the act of one is the act of both; the mind of one, the mind of both; and the conveyance of one, the conveyance of both; whereas, the estate acquired during coverture by husband and wife can not be transferred or prejudiced without the assent of both; and he concludes his description of this tenancy as follows: "If the persons of these tenants are one, there seems to be an in-

consistency in calling them tenants by entireties. One person can have but one seisin, one entirety. The view taken of a tenancy by entireties is shortly this: That the husband and wife are joint tenants. That their tenancy is a species of joint tenancy. That, like other joint tenants, they are seised *per tout*. But unlike other joint tenants, they are not seised *per my*. As seised *per tout*, that their persons are several. As not seised *per my*, but one only. That they are joint tenants and tenants by entireties, because each is seised *per tout*. That they are called tenants by entireties to distinguish them from the joint tenants seised *per my et per tout*: "Ram's Tenure and Tenancy, 170-4.

TENANCY BY ENTIRETY IN THE UNITED STATES.—The common law in regard to estates by entirety is at this day in force in the majority of the states of the American union. It has not been abolished or encroached upon by any of the statutes in reference to joint estates. From an inspection of those statutes it will be discovered that quite a number of them contain exceptions showing that they do not apply to estates granted or devised to husband and wife. But, independent of any express exceptions, they have been almost uniformly confined in their operations to joint tenancies. The reasons advanced for holding that estates by entirety are not included in these statutes are: 1. The statutes apply to joint tenancies only; 2. They apply only to estates held by two or more, whereas estates by entirety are, in the eyes of the law, vested in one person; 3. They apply to estates of which a severance can be made, while this estate of husband and wife is inseverable; 4. Because the wrongs intended to be avoided by the statute arise from joint tenancy alone; and, 5. Because, while a joint tenancy "is prejudicial to the commonwealth and repugnant to the genius of republics," tenancies by entirety are not. On account of the language of the statutes, in a few instances, but more frequently without any aid from the statutes, and because of the reasons already suggested, tenancy by entirety has been recognized in the states of Illinois: *Mariner v. Saunders*, 5 Gilm. 124; *Luz v. Hoff*, 47 Ill. 427; Indiana: *Davis v. Clark*, 26 Ind. 424; *Arnold v. Arnold*, 30 Id. 305; *Jones v. Chandler*, 40 Id. 588; *Hulett v. Inlow*, 57 Id. 412; 26 Am. Rep. 64; Kentucky: *Doe v. Garrison*, 1 Dana, 35; *Rogers v. Grider*, Id. 242; *Moore v. Moore*, 12 B. Mon. 664; *Babbitt v. Scroggin*, 1 Duval, 274. By statute of this state, in force since 1850, husband and wife take as tenants in common, unless a right by survivorship is expressly provided for: Gen. St., ed. of 1873, p. 531, sec. 13. This statute does not affect estates acquired prior to its passage: *Elliott v. Nichols*, 4 Bush, 502. Tenancy by entirety is still recognized in Maine: *Greenlaw v. Greenlaw*, 13 Me. 186; *Harding v. Springer*, 14 Id. 407; in Massachusetts: *Shaw v. Hearsey*, 5 Mass. 521; *Fox v. Fletcher*, 8 Id. 274; *Varnum v. Abbot*, 12 Id. 478; in Michigan: *Fisher v. Provin*, 25 Mich. 347; in Mississippi: *Hemingway v. Scales*, 42 Miss. 1; 2 Am. Rep. 586; *McDuff v. Beauchamp*, 50 Miss. 531; in Missouri: *Gibson v. Zimmerman*, 12 Id. 386; *Garner v. Jones*, 52 Id. 68; in North Carolina: *Woodford v. Higly*, 1 Wins. 237; *Todd v. Zachary*, 1 Busbee Eq. 286; in New York: *Wright v. Sadler*, 20 N. Y. 320; *Golet v. Gori*, 31 Barb. 314; in New Jersey: by the principal case, and *Thomas v. DeBaum*, 1 McCarter Ch. 40; in Pennsylvania: *Robb v. Beaver*, 8 Watts & S. 127; *Auman v. Auman*, 21 Pa. St. 347; *Bates v. Seeley*, 46 Id. 249; *McCurdy v. Canning*, 64 Id. 39; in Tennessee: *Taul v. Campbell*, 7 Yerg. 319; *Ames v. Norman*, 4 Sneed, 692; in Vermont: *Brownson v. Hull*, 16 Vt. 309; in Virginia: *Thornton v. Thornton*, 3 Rand. 179; in Wisconsin: *Ketchum v. Walworth*, 5 Wis. 95; *Bennett v. Child*, 19 Id. 364. In Upper Canada, a statute of 1834 enacted that all land granted to two or

more persons, other than executors, should be held as a tenancy in common, unless an intention sufficiently appeared from the conveyance that a joint tenancy was intended. The court of queen's bench had no doubt that this statute applied only to such conveyances as, but for the statute, would create a joint tenancy; and that it, therefore, would not operate on a conveyance to a husband and wife: *In re Shaver*, 31 Q. B. (Upper Canada) 605.

STATES WHERE TENANCY BY ENTIRETIES DOES NOT EXIST.—In Connecticut, estates by entireties have never been recognized. Deeds and devises to husband and wife are considered as vesting the estate conveyed or devised in the same manner as to other persons. This rule in Connecticut is not based upon any statutory abolition of the common law, but upon the fact, up to the time the question seems to have been first decided (1836), there had been a common understanding so long acquiesced in that the court was unwilling to disturb it: *Whittlesey v. Fuller*, 11 Conn. 340. So in Ohio, the decisions have always been averse to this estate. The main specification against it was that "the *jus accrescendi* is not founded in principles of natural justice, nor in any reasons of public policy applicable to our society or institutions; but, on the contrary, it is adverse to the understandings, habits, and feelings of the people: *Sergeant v. Steinberger*, 15 Am. Dec. 553; 2 Ohio, 305; *Wilson v. Fleming*, 13 Id. 68; *Penn v. Cox*, 16 Id. 30. In Iowa, a tenancy by entireties can be created only by express words for that purpose, and the courts of that state have decided that the statute declaring that conveyances to two or more in their own right create a tenancy in common, unless a contrary intent is expressed, is applicable to conveyances to husband and wife. In so deciding, the court, after alluding to the tendency of legislation and of public sentiment against joint tenancies, said: "But is it still true that the destruction, partial or entire, of joint tenancies does not apply to or affect conveyances to husband and wife? If the legal unity or oneness continues as fully as at common law, then there would seem to be no escape from the conclusion. But this is just what is denied; and in the same connection it is also denied that the 'estate in entirety' exists in this state, or is known to our law.

"It is by no means asserted or claimed that husband and wife are two persons for all purposes, nor that the common law idea of unity is by any means entirely abolished or abrogated. But what is asserted is, that as the wife may hold and convey real estate in the same manner as other persons, so she may take by the same tenure and subject to the same incidents, neither greater nor less, as though a *feme sole*. If no contrary intent is expressed in the conveyance to them, or the instrument under which they hold, the husband and wife take as tenants in common, and not in entirety. At common law they were so far so completely, so essentially one, that they could not take by moieties. And why? Because of this absolute oneness. But does this reason longer exist, or at least with us?" After adverting to legislation in Iowa innovating upon the common law in regard to the powers of a married woman, the court concluded that "her ability now, as compared with the rule of the common law, to take a separate estate, her ability to stand seised in her own right jointly with the husband, and to now hold by moieties just as joint-tenants could, we say these considerations seem conclusively to * * * show that the rule of the common law as to estates in entirety can not obtain here. The doctrine always stood upon what was little more than the merest fiction; and as this, by our legislation, has measurably given way to theories and doctrines more in accord with the true and actual relations of husband and wife, the rule itself must be abandoned." *Hofman v. Stigers*, 28 Iowa, 307. During the past half century various

statutes have been passed to alleviate the rigor of that part of the common law by which the identity of the wife was merged into that of the husband, and the two spouses were for many purposes, and generally to the prejudice of the wife, treated as one person. In some instances the courts have determined that these statutes have, in effect, terminated the legal unity of husband and wife, and have thereby rendered impossible the further creation of estates by entireties by destroying that legal oneness of person which has always been deemed essential to the existence of these estates: *Cooper v. Cooper*, 76 Ill. 57; *Clark v. Clark*, 56 N. H. 105. But the better opinion is, that the operation of these statutes must be limited to the separate property of married women, leaving unaffected and unimpaired the previous law regarding the creation, existence and essential attributes and consequences of estates by entireties: *Goelet v. Gori*, 31 Barb. 314; *Farmers' Bank v. Gregory*, 49 Barb. 155; *Miller v. Miller*, 9 Abb. P. N. S. 448; *Freeman v. Barber*, 3 Thomp. & C. 575; *Beach v. Hollister*, 3 Hun. 519; *Fisher v. Provin*, 25 Mich. 350; *Diver v. Diver*, 56 Pa. 106; *McDuff v. Beauchamp*, 50 Miss. 531; *Robinson v. Eagle*, 29 Ark. 202; *Bennett v. Child*, 19 Wis. 365; *Garner v. Jones*, 52 Mo. 68. But, as we understand the most recent decision of the court of appeals of New York, a conveyance made to a husband and wife in that state under its present statutes will be deemed to vest an estate in the grantees as tenants in common, unless a different intent appears from the conveyance itself. This decision will result in the substantial abolition of estates by the entirety in that state: *Meeker v. Wright*, 8 Reporter, 214; 7 Abb. N. C. 299.

A TENANCY BY ENTIRETIES MAY EXIST IN AN ESTATE "in fee, in tail, for life, or for years, or other chattel real." 2 Preston on Abstracts of Title, 39; *Wiscot's case*, 2 Rep. 60; 5 Bac. Abr. 244; *Downing v. Seymour*, Cro. Eliz. 912. It may be of an estate in possession, reversion or remainder: *Purefoy v. Rogers*, 2 Saund. 382. It may also be of customary estates: *Glaiter v. Hever*, 8 Ves. 195. A tenancy by entireties of the legal estate may exist between husband and wife under such circumstances that in equity they will be regarded as tenants in common. Thus, if a man and wife hold the equitable title to a tract of land as tenants in common, and a patent based upon such equitable title issue to them, they will thereafter hold the legal title as tenants by entireties, with the right of survivorship; yet her equitable estate will not be thereby defeated, but will descend to her heirs at her death: *Norman v. Cunningham*, 5 Gratt. 70.

IN PERSONAL PROPERTY.—Mr. Bishop, in his recent work on the Law of Married Women, says: "If real estate is conveyed by deed to a husband and wife, this creates in them a peculiar kind of tenancy, known as tenancy by the entirety, the consequence of which is, that during the coverture neither can alien the land to the prejudice of the rights of the other, and on the dissolution of the coverture by the death of one of them the survivor takes the whole. Nothing of this sort is known in respect of personal property. Since the wife can not own personal property in her possession in her own right, but whatever title she has to such property vests in the husband, if a chattel is given or sold to husband and wife jointly, the title passes wholly to him:" Bishop on the Law of Married Women, sec. 211. The declaration that nothing in the nature of tenancy by entirety is known in respect to personal property, is supported by a single citation: *Polk v. Allen*, 19 Mo. 467. But in a later case in the same state, *Shields v. Stillman*, 48 Mo. 86, a husband and wife were regarded as tenants by entirety of a promissory note. That it is so feebly supported is not attributable to omission to take advantage of

whatever may have been available on that side of the question, but to the fact that there are certainly few cases, and in all probability no case, in accord with the one on which Mr. Bishop's assertion is based. On the other hand, the reports, English and American, new and old, abound in cases recognizing tenancy by entirety in all kinds of personal estate, and enforcing the right of the surviving husband or wife to the entire property." *Bricker v. Whalley*, 1 Vern. 233; *Cowper v. Scott*, 3 P. Wms. 121; *Pateson v. Rankin*, 5 Weekly Cin. Law Bulletin, 69; *Att'y Gen'l v. Bacchus*, 9 Price, 30. Thus, a legacy to a husband and wife of one hundred pounds per annum vests in them as tenants by the entirety, and the survivor is entitled to the whole: *Cowper v. Scott*, 3 P. Wms. 120. The same is true of a joint judgment in favor of husband and wife: *Bond v. Simmons*, 3 Atk. 21; *Anon*, 3 Atk. 726; *Coppin v. —*, 2 P. Wms. 496; and of all choses in action taken by them in their joint names: *Jickling's Anal. L. and Eq. Estates*, 257, citing *Temple v. Temple*, Cro. Eliz. 791; *Norton v. Glover*, Noy, 149. As to promissory note, see *Shields v. Stillman*, 48 Mo. 86. And whenever a husband procures stocks in the name of himself and wife, or takes notes, mortgages, or other securities in his and her names, a tenancy by entirety is created in such stocks, notes, mortgages, or other securities. The husband is presumed to have meant something by the use of his wife's name, and that something is also presumed to have been intended for her advantage. Had he desired to be the sole owner, he would have used no name other than his own. But having had her name inserted with his own, she, in the event of his death, becomes sole owner of all which the two at the moment of his decease possessed as tenants by the entirety: *In re Gadbury*, 32 Law J. Rep. (N. S.) ch. 780; *Craig v. Craig*, 3 Barb. Ch. 104; *Draper v. Jackson*, 16 Mass. 486; *Christ's Hospital v. Rugdin*, 2 Vern. 683; *Rider v. Kidder*, 10 Ves. 360. So, when a husband purchased a *Walk in a Chase*, and took the patent to himself and wife and B., and her right to the share of the patent was afterwards questioned, the court said: "It shall be presumed to be intended as an advancement and provision for the wife;" and decreed that she should have the benefit of the patent during her life: *Kingdon v. Bridges*, 2 Vern. 67.

THE CROPS RAISED ON LAND held by husband and wife as tenants by entirety, are, according to a recent decision of the supreme court of Indiana, also held by entireties, and are, therefore, not subject to levy under an execution issued against the husband alone: *Pateson v. Rankin*, 5 Weekly Cin. Law Bulletin, 69; referred to in 12 Ch. L. News, 221.

CREATION.—"The same words of conveyance which would make two other persons joint-tenants will make a husband and wife tenants of the entirety, so that neither can sever the jointure, but the whole must accrue to the survivor." De Gray, C. J., in *Green v. King*, 2 Wm. Black. 1213; *Martin v. Jackson*, 27 Pa. St. 504; *Doe v. Parratt*, 5 Term. Rep. 652; *Farmers' Bank v. Gregory*, 49 Barb. 155; *Den v. Hardenbergh*, 5 Halst. 45. Hence a bequest to my daughter Catherine M., wife of Samuel M., the one eighth part to *them*, as it manifests by the use of the words "*to them*" an intent to give property to a husband and wife, gives rise to a tenancy by entireties: *Hamm v. Meisenheller*, 9 Watts, 350. But it seems to be essential that the spouses be *jointly entitled*, as well as jointly named, in the deed. Hence, if the wife alone be entitled to a conveyance, and it is made to her and her husband jointly, the latter will not be allowed to retain the whole by survivorship. This is equally true where the conveyance is so made at her request, because, being a married woman, she is presumed by the common law to have acted under the power and by the coercion of her husband:

Moore v. Moore, 12 B. Mon. 664; *Babbitt v. Scroggin*, 1 Duval, 273. Tenancy by entirety is not always created by purchase. In Pennsylvania it has been determined that a husband and wife inheriting property as heirs of one of their children, acquire thereby an estate by entireties: *Gillan v. Dixon*, 65 Pa. St. 395.

HUSBAND AND WIFE TAKE AS ONE PERSON.—The husband and wife not only take an entire estate as one person, when it is granted to them, but they are also regarded as one person in any conveyance made to them and others, and, therefore, take but one moiety. Thus, if a deed be made to A. and wife and B., here A. and wife together take but one half: *Doe v. Wilson*, 4 Barn. & Ald. 303; *Barber v. Harris*, 15 Wend. 615; *Back v. Andrew*, 2 Vern. 120; *Bricker v. Whalley*, 1 Vern. 233; Litt., sec. 291; *In re Wyld*, 2 D. M. & G. 724; *contra*, see *Warrington v. Warrington*, 2 Hare, 56. This is true, whether the conveyance be intended to create a joint tenancy or a tenancy in common: *Johnson v. Hart*, 6 Watts & S. 319. A legacy was given to Captain R. G., his wife and children. The master of the rolls, in construing the bequest, said: "The testatrix has used no words from which it can be discovered what, if any, intention she had with respect to the proportions in which the legatees were to take and enjoy the legacy thus given to them jointly. Under such circumstances, the proportion must be determined by the ordinary rule applicable to such cases; and there being nothing to distinguish the present case from those in which the rule stated in Littleton, and applied in several cases cited at the bar, was acted upon, I am of the opinion that the legatees must take in thirds, viz., the husband and wife one, and the two children each of them one." *Gordon v. Whieldon*, 18 L. J. Rep. (N. S.) Chan. 5; 11 Beav. 170; *Atcheson v. Atcheson*, 18 L. J. Rep. (N. S.) Chan. 230; 11 Beav. 485.

THAT THE HUSBAND AND WIFE CAN NOT TAKE BY MOIETIES.—We have seen that the peculiar ground on which the tenancy by entireties rests is the legal identity of husband and wife. "Husband and wife being one person in law, they can not, during the coverture, take separate estates; and, therefore, upon a purchase by both, they can not be seized by moieties, but both and each has the entirety." *Green v. King*, 2 W. Bl. 121. The language just quoted was used in the support of the proposition, that husband and wife take by entireties in all cases where there is no express limitation; but, going beyond the necessities of the case out of which it arose, it assumes, beyond mistake, that the inevitable consequence of the legal identity of husband and wife is, that they can receive, during coverture, no estate which does not vest in them by entireties. No doubt there are a number of cases, both English and American, containing *dicta*, which, like that quoted above, seem inconsistent with the possibility of husband and wife receiving an estate by moieties: *Rogers v. Benson*, 5 Johns. Ch. 437; *Jackson v. Stevens*, 16 Johns. 115; *Barber v. Harris*, 15 Wend. 617; *Taul v. Campbell*, 7 Yerg. 319; *Motley v. Whittemore*, 2 D. & B. 537; *Ketchum v. Walworth*, 5 Wis. 95; *Thornton v. Thornton*, 3 Rand. 182. But in addition to the *dicta* alluded to, there are cases directly in point, affirming that the spouses can not take estates as tenants in common, nor as joint tenants. Thus, in New York, a deed was made to J. C. and his wife, "as tenants in common and in equality of estate, and not as joint tenants." The assistant vice-chancellor, after some discussion of the authorities, determined that this conveyance necessarily passed an estate by entireties, because there was "a legal incapacity to take in severalty, arising from a legal identity; and a grantor can not remove that incapacity without the intervention of a trustee." *Dias v. Glover*, 1 Hoffm. Ch. 76. In Pennsylvania, a deed to Wm.

B. and his wife Rebecca, purported to convey to them "as tenants in common, and not as joint-tenants." After citing and approving the decision by the assistant vice-chancellor in New York, the supreme court of Pennsylvania, in an opinion in reference to the legal effect of this last deed, said: "If the doctrine to which we refer is not a mere rule for ascertaining the meaning of words, but a rule of law founded on the rights and incapacities of the matrimonial union, it must be obvious that the intention of the parties to the conveyance is entirely immaterial. If the husband and wife can not take a conveyance by moieties, if they are absolutely incapable of receiving such a grant, it is clear that no words in the conveyance to them, however clearly expressed, can give them that capacity. How stands the argument on this question? Tenants in common may sell their respective shares. They are compellable to make partition. They are liable to reciprocal actions of waste and account; and if one turns the other out of possession, an action of ejectment will lie against him. The incidents can not exist in an estate held by husband and wife. No action of partition or waste, or account or ejectment, can be maintained by one against the other. The husband could not sell his moiety free from the dower of his wife. The wife could not sell hers at all, without the consent of her husband. It is evident, therefore, that the estate during the lives of the grantees, or during the continuance of the marriage bond, would have none of the chief incidents of a tenancy in common. The existence of a tenancy in common, which can not be so held or enjoyed during the lives of the holders, and which has none of the incidents of such an estate, is a legal impossibility. If they can not hold in common during their lives, of course they can not so hold after one of the parties is dead." *Stuckey v. Keefe's Ex.* 26 Pa. St. 400. So in Ireland, when a conveyance was made to husband and wife, the court was "of opinion that the operation of that conveyance was to grant an estate by entireties; for to speak of a grant to a husband and wife as an estate of joint tenancy is, properly speaking, a solecism:" *Pollok v. Kelly*, 6 Ir. L. R. (N. S.) 373.

THAT HUSBAND AND WIFE MAY TAKE BY MOIETIES.—The decisions, as we have seen, denying that husband and wife may take an estate other than by entireties, rest upon two grounds. The first and chief of these grounds is that the spouses can not take any other estate; the second, as appears from the reasoning quoted from the opinion of the supreme court of Pennsylvania, is, that the spouses can not, during coverture, enjoy any other estate. The second ground can, we think, be readily disposed of by the authorities. For, though the rights and remedies of a married woman who is co-tenant with her husband may be limited during coverture, she is, nevertheless, as much a co-tenant with him as he was before their marriage. There can be no doubt that if a man and woman, holding an estate as co-tenants, marry, they will continue to be joint tenants or tenants in common as before their marriage: *Moody v. Moody*, Amb. 649; *McDermott v. French*, 15 N. J. Eq. 80. So there is no reason for asserting that husband and wife can not hold but by entireties. But the second ground can not be so easily answered. Husband and wife may take an estate as tenants in common or as joint tenants, as between themselves and others. Thus, if a bequest were made to A. and wife and B., with words of severance, it would vest as a tenancy in common, A. and wife having one moiety, and B. the other: *Paine v. Wagner*, 12 Sim. 188; but the moiety of A. and wife would, nevertheless, vest in them as an entirety: *Barber v. Harris*, 15 Wend. 617. But it is doubtful whether any reported case, prior to the publication of Mr. Preston's "Treatise on Estates," ever supported the doctrine that, as between themselves, husband and wife can take

an estate other than by entireties. In that treatise, the assertion was made that "in point of fact, and agreeable to natural reason, free from artificial deductions, the husband and wife are distinct and individual persons; and, accordingly, when lands are granted to them as tenants in common, thereby treating them without any respect to their social union, they will hold by moieties as other distinct and individual persons would do." Clear as this language is, and logical as it seems to be, it has the peculiarity of being the cause rather than the result of the reported decisions in harmony with it. It finds no support in the early reports; and Mr. Preston was so fully aware of the doubtful character of his assertion that, in his work on Abstracts of Title, 1 Preston on Abstracts, 132, he repeated it in this modified form: "And even a husband and wife may, by express words, *at least so the law is understood*, be made tenants in common by a gift to them during coverture." In America, the doctrine of Mr. Preston has met with some approval. In New York, the decisions are variant. That of the assistant vice-chancellor, made in 1839, has already been alluded to in the preceding section. Subsequently a case came before the vice-chancellor; where a deed had been made to husband and wife, "the one equal half part to each." The decision made upon this deed was based upon a citation from one of Mr. Preston's works. The vice-chancellor stated the substance of the rule as laid down by Mr. Preston, and added: "I have no hesitation about adopting and following this rule, especially in a court of equity, where the intention of the parties in any deed or instrument not contrary to law should be allowed to prevail:" *Hicks v. Cochran*, 4 Edw. Ch. 110. In New Jersey, a bill for partition alleged that on the first of September, 1858, a husband and wife were seised in fee of the premises, as tenants in common, by virtue of a certain conveyance made to them; that thereafter the husband had sold his interest to the complainant. The bill was against the wife to compel partition. A demurrer was interposed on the ground that the estate conveyed to the husband and wife must necessarily have been an entirety, and was, therefore, not subject to partition. This portion of the demurrer was overruled on the authority of Mr. Preston, reference being made to his work on Estates. The chancellor said: "So it seems that a husband and wife may, by express words, be made tenants in common by gift during coverture. The bill alleges that the husband and wife were seised as tenants in common by virtue of a conveyance made to them. Even, therefore, if it appears by the bill that the conveyance was made during coverture, that fact is not absolutely inconsistent with the creation of a tenancy in common. As there is a direct averment that the conveyance created a tenancy in common, it must be assumed that apt words were used in the deed for that purpose. This objection can not prevail on demurrer:" *McDermott v. French*, 15 N. J. Eq. 80.

POWER OF HUSBAND OVER ESTATE BY ENTIRETIES.—The title and rights of the wife in an estate held by herself and husband, by entireties, are not liable to be conveyed, incumbered, or otherwise prejudiced or disposed of, by her husband, to any greater extent than though such estate was vested in her exclusively in her own right. Many cases contain the general statement that no conveyance or incumbrance made by the husband is valid against the wife: *Doe v. Parratt*, 5 T. R. 655; *Bennett v. Child*, 19 Wis. 365; *Bomar v. Mullins*, 4 Rich. Eq. 80; *Ketchum v. Walsworth*, 5 Wis. 95. Upon examination of these cases it will be found that the general language employed in them is applicable only to the rights of the wife as survivor of such species of property as would not have been subject to the control and disposal of the husband, had she owned it in severalty. As to such property, not even

the conviction of a husband for high treason can defeat the right of his wife to the whole as survivor: *Washburn v. Burns*, 34 N. J. Law, 19; Co. Lit. 147 a; *Beaumont's case*, 9 Rep. 140 b. It must be remembered that a husband by marriage acquires, "during coverture, the usufruct of all the real estate which his wife has, in fee-simple, fee-tail, or for life." That he has the further right to reduce her personal estate to his possession, to sue for her chattels and upon her choses in action in his own name, and to dispose of her personal property as he may think fit. The same power which enables a husband to obtain possession and control of the wife's estate when held by her in severalty, entitles him to a similar power over her interest in like property held by herself and husband in entireties. There is, therefore, little or no doubt that, by the common law, the husband could dispose of the possession of real estate held by entireties, and that he could mortgage and otherwise incumber such real estate; and that his grantee or mortgagee thereby acquired rights which were paramount to the rights of the wife during the life of the husband, and subordinate only to her claim as survivor. So in regard to personal estate held by entireties, the husband could reduce it to his sole possession, and claim, and hold it as his sole property. When he so reduced it, it became his, and he could sell or incumber it at his pleasure: *Draper v. Jackson*, 16 Mass. 486; *Grute v. Socroft*, Cro. Eliz. 287; *Watts v. Thomas*, 2 P. Wms. 364; *Bates v. Dandy*, 2 Atk. 207; *McCurdy v. Canning*, 64 Pa. St. 40; *Bennett v. Child*, 19 Wis. 365; *Torrey v. Torrey*, 14 N. Y. 430; *Jackson v. McConnell*, 19 Wend. 175; *Barber v. Harris*, 15 Wend. 617; *Ames v. Norman*, 4 Sneed. 692; *Farmer v. Gregory*, 49 Barb. 155.

SALE UNDER EXECUTION.—In a recent work on judicial sales, the statement is made that "no separate proceeding against one of them during their joint lives will, by sale, affect the title to the property as against the other one as survivor, or as against the two during their joint lives." Rorer on Judicial Sales, sec. 549. The rule, as thus laid down, ignores the interest which the husband, by his marital rights, has in the property of his wife. As the husband could, by the common law, dispose of all chattels and chattel interests of the wife, and of the possession of her real estate during their joint lives, he had such an interest in her estate as might be subjected to involuntary alienation by sale under execution. Hence, there seems but little doubt that where the marital rights of the husband in the wife's property remain as at common law, they are subject to seizure and forced sale under execution; and that the purchaser at such sale will acquire an interest in the estate sold, by virtue of which he will succeed to all the rights and privileges which the husband had by law in the property sold: *Ames v. Norman*, 4 Sneed. 692; *Stoebler v. Knerr*, 5 Watts, 181; *French v. Mehan*, 56 Pa. St. 289; *McCurdy v. Canning*, 64 Id. 41; *Bennett v. Child*, 19 Wis. 362; *Litchfield v. Cudworth*, 15 Pick. 23; *Brown v. Gale*, 5 N. H. 416. It is true that a few American cases are inconsistent with this rule. Most of them seem to have been decided, so far as this point is concerned, without any consideration of the authorities, and without any necessity of determining this question: *Jackson v. McConnell*, 19 Wend. 178; *Thomas v. De Baum*, 1 McCarter Ch. 40. But in Indiana this point was recently considered at great length, and most of the authorities bearing on the subject were commented upon by the court. The result was a denial of the husband's marital powers over an estate held in entireties, including a denial of his right to dispose of the possession of real estate, or in any way to transfer to a third person, by voluntary or involuntary alienation, any interest which could be asserted against the wife, even during her husband's life-time. The court said: "As between

husband and wife, there is but one owner, and that is neither the one nor the other, but both together. The estate belongs as well to the wife as to the husband. Then how can the husband possess any interest separate from his wife, or how can he alienate or encumber the estate, when all the authorities agree that the wife can neither convey nor encumber such estate? We are of the opinion that from the peculiar nature of this estate, and from the legal relations of the parties, there must be unity of estate, unity of possession, unity of control, and unity in conveying or encumbering it; and it necessarily and logically results that it can not be sold upon execution for the separate debts of either the husband or of the wife. The estate is placed beyond the exclusive control of either of the parties, or the reach of creditors, unless it can be successfully attacked and set aside for fraud." *Chandler v. Cheney*, 37 Ind. 408.

HUSBAND'S POWERS, HOW AFFECTED BY STATUTES.—In many of the states the common law, in regard to the marital rights of a husband in the property of his wife, has been materially modified by statute. These statutes influence the law, in regard to estates held in entirety, as well as in regard to those held by the wife in severalty. Thus, in Pennsylvania, the act of April 11, 1843, declared that "every species of property, of whatever name or kind, which may accrue to any married woman during coverture, shall be owned, used, and enjoyed by such married woman as her own separate property, and shall not be subject to levy and execution for the debts of her husband; nor shall such property be sold, conveyed, mortgaged, or transferred, or in any manner encumbered by her husband, without her written consent first had and obtained." Under this act, it has been determined that a purchaser of the husband's interest in property held in entirety, either at a voluntary or involuntary sale, can never assert it against the wife, because, if the claims of such purchaser were recognized, the rights of the wife would be disregarded: 1st, by destroying her estate by entirety, and creating out of it a tenancy in common; 2d, by depriving her of her possession with her husband, and obliging her to hold possession with a stranger; 3d, by taking away her property without her assent: *McCurdy v. Canning*, 64 Pa. St. 41. The principle thus asserted in Pennsylvania, has, under a very similar statute, been affirmed by a number of decisions in Indiana: *Davis v. Clark*, 26 Ind. 424; *Arnold v. Arnold*, 30 Ind. 305; *Simpson v. Pearson*, 31 Ind. 1; *Chandler v. Cheney*, 37 Ind. 413.

DISSOLUTION OF THE TENANCY BY DEATH OR DIVORCE.—In the event of the death of either spouse, during the continuance of an estate held by entirety, the survivor continues seized of the whole. During the continuance of the marital relations, neither husband nor wife can change the character of the tenancy so as to become a tenant in common, nor a joint tenant, nor an owner in severalty. But by a decree of divorce, the legal unity of person, on which the estate depended, is destroyed; "one legal person has been resolved by judgment of law into two distinct, individual persons, having in future no relations to each other; and with this change in their relations, must necessarily follow a corresponding change of the tenancy dependent upon the previous relation. As they can not longer hold in joint seisin, they must hold by moieties." *Ames v. Norman*, 4 Sneed, 696; 2 Bright on Husband and Wife, 365. But it is claimed that if a husband alienate property held by entirety, the alienee takes a title not dependent on the continuance of the marital relations; and that the wife is not, by virtue of the annulment of the marriage, entitled to the possession of her moiety from her husband's grantee. The purchase, "not made in view of the contingency of the wife's divorce,

cannot be affected by it:" *Ames v. Norman*, 4 Sneed, 696. But in the event of the death of a husband, the rights of the alienee of property of which the husband could make no absolute disposition, cease; and the surviving wife may recover possession by an action of ejectment: *Brownson v. Hull*, 16 Vt. 309.

GULICK v. WARD & BAILEY.

[5 HALSTED, 87.]

ILLEGAL CONTRACT.—A contract designed to defraud the government or to defeat the policy of a statute of the United States is illegal, and a cause of action based upon it can not succeed in any court of justice.

UNLAWFUL CONSIDERATION.—An obligation, executed in consideration of an agreement that the obligee would forbear to compete with the obligor in offering proposals for the carrying of the United States mail on a certain route, is founded on an unlawful consideration, and therefore void.

THE facts are stated in the opinion of the judges.

Wood, for the plaintiffs.

W. Chetwood and M. Ogden, for the defendants.

EWING, C. J. This action was brought to recover the sum of one thousand dollars, stipulated in a written agreement to be paid by the defendants to the plaintiffs. Upon the trial, at the circuit court, the defendants insisted that the promise was void, because the consideration was illegal, and the plaintiffs were, therefore, not entitled to recover. The judge reserved the question for determination here, and a verdict was rendered for the plaintiffs, which the defendants now seek to set aside. The agreement between the parties, and the consideration of the promise, are fully developed in the declaration, which is in these words:

"Whereas, on the twentieth day of September, in the year of our Lord eighteen hundred and twenty-three, the postmaster-general of the United States of America, at the city of Washington, in the district of Columbia, to wit, at New Brunswick, in the county of Middlesex, was minded and intended to make a contract with good and responsible men, for carrying at a fair and reasonable price, to be agreed upon by the said postmaster-general and such men, the mail of the United States, from the city of Philadelphia to the city of New York, for such a term or time as might be agreed upon between them; and whereas, the said William Gulick and John Gulick did propose, and intend to endeavor to obtain the said contract to carry the said mail

between the said cities, at such just and reasonable price, and were well provided with horses, stages, sulkies, and drivers, and were recommended and known to the said postmaster-general to be thus provided, and to be of good reputation and credit, and to be relied on for the faithful performance of all and every agreement they should make in the premises, and were attending on the day and year aforesaid, at the said city of Washington, to offer for and endeavor to procure such contract; and, whereas, also the said Isaac Ward, and also one Chester Bailey, whom the sheriff of the county of Essex has returned not to be found in his bailiwick, and also one Thomas Lyon, now deceased, and whom the said Isaac and Chester have survived, were also minding and intending to procure for themselves the said contract, at a just and reasonable price, and were also of good credit and repute, and provided in like manner to perform any agreement which they might take in the premises, with the said postmaster-general, and were also personally attending at the said city of Washington, but were apprehensive that as the said John Gulick had for many years before that time carried the said mail over a large part of the said route, and was well known and esteemed by the said postmaster-general as a faithful and a punctual man in the performance of his engagements; that the said John Gulick and the said William Gulick might, on those accounts, be preferred and obtain the said contract. Whereupon, in consideration of the said premises, and also in consideration that the said John Gulick and William Gulick would forbear to propose or offer themselves to the said postmaster-general, and also forbear to procure any other persons to propose to him to carry the said mail on the route aforesaid, or any part thereof, for such time and term as should be included in the contract then intended to be made. They, the said Isaac Ward, Chester Bailey, and Thomas Lyon, in his lifetime, on the year and day aforesaid, at Washington, to wit, at New Brunswick, in the county of Middlesex, undertook and faithfully promised the said John Gulick and William Gulick, that if they the said Isaac, Chester and Thomas should become contractors as aforesaid, they would pay unto the said John Gulick and William Gulick the sum of one thousand dollars in sixty days after the first day of January, then next ensuing, and the said John Gulick and William Gulick say, that, confiding in the said promise and undertaking of the said Isaac, Chester, and Thomas, they did, from the time of making thereof, wholly forbear from proposing or offering themselves to the said post-

master-general, and from causing any of the persons to offer to carry the said mail on the said route, or any part thereof, for the time of the said contract; and they, the said Isaac, Chester, and Thomas, being preferred by the said postmaster-general, to any other candidates for the said contract, did obtain the said contract for carrying the said mail on the said route, at a just and reasonable price, for the time and term of four years; and have enjoyed the benefits, advantages and compensation, in the said contract, secured to such contractors. By reason of which said premises, the said Isaac, Chester, and Thomas, in his life-time, and the said Isaac and Chester, since his death, became liable to pay unto the said John and William the said sum of one thousand dollars, in sixty days after the first day of January, in the year of our Lord eighteen hundred and twenty-four, according to the form and effect of the said promise and undertaking."

Is this promise valid? Is the consideration of it legal?

By the act of the congress of the United States, regulating the post-office establishment: 4 vol., ed. of 1816, 293, sec. 8, it is enacted: That it shall be the duty of the postmaster-general to give public notice, in one or more of the newspapers published at the seat of government of the United States; and in one or more of the newspapers published in the state or states or territory where the contract is to be performed, for at least six weeks before entering into any contract for carrying the mail, that such contract is intended to be made, and the day on which it is to be concluded, describing the places from and to which such mail is to be conveyed, the time at which it is to be made up, and the day and hour at which it is to be delivered. He shall moreover, within ninety days after the making of any contract, lodge a duplicate thereof, together with the proposals which he shall have received respecting it, in the office of the comptroller of the treasury of the United States.

Pursuant to the requirement of the act of congress, the postmaster-general had given public notice of his intention to contract, and his readiness to receive proposals for carrying the mail between the cities of Philadelphia and New York. The parties in this suit, in consequence of this notice, attended at Washington, intending to offer proposals, when the arrangement stated in the declaration was there made between them, the plaintiffs relinquished their intention, and the contract was made by the postmaster-general with the defendants.

The policy of the provision contained in the act of congress, requiring this procedure by the postmaster-general, in thus

publicly inviting proposals, is to enlarge the number of offers, to increase the competition among persons disposed to contract, and thereby not only to secure to the United States faithful and capable carriers, but to procure the performance of this important public service in the best manner, and upon fair, just, and reasonable terms. The principle is the same as requires a sheriff or executor to give public notice of the sale he is about to make, or induces an individual publicly to announce the vendue of his property. Now, an arrangement which shall diminish the number of competitors, lessen the number of proposals, or induce any one or more to abandon his intention of making an offer to contract, is most evidently in direct contravention of the policy of the act of congress, and tends to defraud, or perhaps it may be broadly asserted, does at all times actually defraud the United States. It defeats the policy of the statute; for it destroys the competition and precludes the advantages which inevitably result from it. The expense to the government is certainly augmented. Of two individuals who are willing to perform the service for the same remuneration, one may, for various reasons, be far more eligible than the other. But the most eligible may be induced to withdraw. It operates to defraud the United States. The premium paid to prevent competition is directly or indirectly charged upon them. The terms proposed are always calculated to cover the expenditure. The corollary is indisputable, that if the successful contractor can afford to pay one thousand dollars to induce a rival to stand out of his way, he can, if not compelled to make such payment, afford to perform the service for precisely that sum less than the recompense he is to receive from the postmaster-general. To the contractor it is exactly the same, whether he reduces the sum he requires from the public one thousand dollars, or whether he pays that sum to his intended competitor. If, in the present case, the defendant could afford to pay to the plaintiffs one thousand dollars, it is conclusive evidence that they required of the public that sum more than the service they were to perform was justly worth. The evidence produced on the trial of this cause, and detailed in the state of the case before us, fully proves the truth of these remarks, the importance of the competition, and the effects of it upon the interest of the public service. After the defendants had induced the plaintiffs to abandon their intention of making proposals, and had exhibited their offer, they discovered, very unexpectedly, another competitor, and that another proposal was made, which they

had not anticipated nor silenced. They immediately lowered their proposal one thousand five hundred dollars, and this, too, to prevail against persons who were not, like the plaintiffs, "well provided with horses, stages, sulkies and drivers," and who had not, like them, been accustomed to carry the mail on the route in question, and whose ability and experience the post-master-general might therefore justly hold in high estimation. The circumstances disclosed on the trial, then, most manifestly support the conclusion naturally drawn from the agreement itself; that in object and effect it was inconsistent with the policy of the act of congress, and tended, to say the best, to defraud the United States.

The principles of law, which compel a court to refuse to enforce a promise founded on such consideration, are very clear, very salutary, and perfectly well established. In *Jones v. Randall*, Cowp. 39, Lord Mansfield, and the court of king's bench, held that "many contracts which are not against morality, are still void as being against the maxims of sound policy." In *Blachford v. Preston*, 8 T. R. 95, Lawrence, J., said: "A plaintiff can not recover in a court of justice, whose cause of action arises out of a contract made between him and the defendant in fraud, or to the prejudice of third persons." And on that ground, as well as because it was contrary to the principles of public policy to allow of such contracts as that before the court, he held that the plaintiff could not maintain his action. In *Mitchell v. Smith*, 1 Binney, 120 [2 Am. Dec. 417], the supreme court of Pennsylvania held that contracts to violate the rules of decency or morality, or oppose principles of sound policy of the country, are illegal and void. In *Sterling v. Sinnickson*, 2 South. 756, Chief Justice Kirkpatrick said: "If the consideration be against the public policy, it is insufficient to support the contract;" and Justice Rossell said: "It is a general principle that all obligations for any matter, operating against the public policy and interests of the nation, are void." In 3 Halstead, 54, a note made by a candidate for the office of sheriff, in consideration of a promise to give him the interest of the payee at the election, was held illegal and irrecoverable. In *Parsons v. Thompson*, 6 Hen. Bl. 322,¹ the plaintiff had long been master-joiner of the dock yard, at Chatham, and was entitled to be superannuated and to retire on a pension; the defendant, wishing the office, promised, if he would retire, in case he should obtain the office, as he afterwards did, to allow a cer-

1. 1 Hen. Bl. 322.

tain portion of the proceeds, to recover which the action was brought. The court had held that the agreement, made without the knowledge or sanction of the admiralty, who held the power of appointment, had no sufficient consideration to maintain an action. In *Hannay v. Eve*, 3 Cranch. 247, the supreme court of the United States held, that an agreement made between foreign mariners to save a ship and cargo, under the semblance of a condemnation in the admiralty court here, was not an immoral act, but a stratagem authorized by the laws of war; yet, as it was a fraud on a resolution of congress, that is to say, a contrivance to evade the resolution, the courts of the United States could furnish no aid in giving efficacy to it.

In *Jones v. Caswell*, 3 Johns. Cas. 29 [2 Am. Dec. 134], in consideration of the forbearance or omission to bid at a sheriff's sale of real estate, a promissory note on which this action was brought, was given by the defendant, who became a purchaser. The consideration was held to be illegal, and the note irrecoverable. Justice Radcliff said: "It was a consideration which ought not to be sanctioned in a court of justice. The law has regulated sales on execution with a jealous care, and enjoined such proceedings as are likely to promote a fair competition. A combination to prevent such competition is contrary to morality and sound policy." Justice Kent said: "It was a consideration against public policy, which encourages bidding at sales on execution. I think the consideration must be adjudged void as against public policy, and the interests of the original debtor whose property was liable to be sacrificed by such combinations." In *Doolin v. Ward*, 6 Johns. 194, certain articles were to be sold by auction at the navy yard, at Brooklyn, and the parties being desirous to purchase, agreed that the plaintiff should not bid against the defendant, who should purchase the articles and afterwards divide equally, it was held that the contract was without consideration, and void, and against public policy. In *Wilbur v. How*, 8 Johns. 444, a contract or job for making a road being set up at auction, the parties agreed that if either bid it off, it should be divided between them. One bid it off, and refused to give the other a share. The court held that the contract was a *nudum pactum*, and a fraud on the vendor. In *Thompson v. Davies*, 13 Johns. 112, the court decided that an agreement which tended to prevent competition at a sale under execution, was contrary to public policy, and void. Spencer, J., in delivering the opinion of the court, said: "It has been urged that the plaintiff was not bound to bid on

the second execution, and was, therefore, at liberty to enter into this agreement. That is not the test of the principle. In none of the cases cited was the party bound to bid, but being at liberty to bid, he suffered himself to be bought off in a way which might prevent a fair competition. The abstaining from bidding upon consent, and by agreement, under the promise of a benefit for thus abstaining, is the very evil the law intends to repress. A public auction is open to every one, but there must be no combination among persons competent to bid, silencing such bidders, for the tendency to sacrifice the debtor's property is inevitable."

It was insisted by the plaintiff's counsel on the argument that some of these cases have no application here, because the proceeding on the part of the postmaster-general is not an auction. It is of very little importance by what name it is most aptly to be designated, if the principles illustrated by these cases may be justly brought to bear upon it. Yet, is there any radical difference? Is a proposal in writing less a bid than a verbal offer? Is the Dutch mode of sale not an auction, because the biddings are downward? Does it lose the name of auction when it happens that no more than one bid has been made by any one bidder when the article is struck off? May not a sheriff or executor, like the postmaster-general, if no just and competent offer be made, decline, by striking off the property, to accept either, and adjourn the sale to a more favorable season, and for new and better offers? Is not the competition equally desirable in the one as in the other case? Is not the combination which may silence a bidder alike prejudicial? If a party be bought off, does it not in both cases prevent a fair competition? Is not the abstaining from bidding under the promise of a benefit as much in the one as in the other case an evil which the law does and ought to repress? It may not be unworthy of notice, though it may not deserve to aid the argument, that the postmaster-general in his advertisements, one of which I have recently seen, speaks of the persons offering proposals as bidders.

It was farther insisted that the object of the section of the act of congress was simply to point out the mode whereby publicity should be given, and a competition be brought about, and nothing more. But it is clear that this view of the matter falls below the wisdom of the act. Why induce a competition unless to subserve some valuable purpose? And can it be possible that this purpose shall be defeated with impunity? Can it be

possible that even the courts of the United States are obliged to give their aid, and yield their power to enforce a contract avowedly designed to counteract this purpose, and to deprive the government of the most valuable benefits this competition was designed to attain?

The cases cited and relied on by the counsel of the plaintiffs do not, in the slightest measure, conflict with those which I have referred to, nor establish any principle which can support the contract made between these parties. In *Hutton v. Lewis*, 5 T. R. 639, the plaintiff, the master of an academy, agreed to relinquish his situation in favor of the defendant, to grant him a lease of the house, and to assign him part of the household furniture and fixtures at a valuation, in consideration of which the defendant agreed to pay the plaintiff an annuity. This annuity was sustained. But the public was not injured by the change of schoolmasters, unless, indeed, the one was preferable to the other, which the case does not evince or assert. The case of *Davis v. Mason*, 5 T. R. 48,¹ shows that a bond restraining a person from exercising a trade or profession in a particular place, may, on proper consideration, be valid, while an obligation not to exercise it at any time or place would be illegal. Now, the ground on which this decision rests is that such an agreement is not in its tendency injurious to the public. It is of little importance that the tradesman is excluded from one spot while every other place is open to him. This position is expressly assumed by the supreme court of Massachusetts, in another of the cases cited for the plaintiff: *Pierce v. Fuller*, 8 Mass. 223 [5 Am. Dec. 102]. The defendant, who had been running a stage from Boston to Providence, entered into an obligation not to run there in opposition to the stage the plaintiff had, or contemplated to set up. The court held the agreement valid. They said: "Bonds to restrain trade in general are unquestionably bad, as tending to create a monopoly injurious to the public. But bonds to restrain trade in a particular place may be good if executed for a sufficient and reasonable consideration. The public appear to have no interest in this question. If the plaintiff did not run his stage, the defendant might run a stage, for it could not be in opposition to the plaintiff's stage, and it is indifferent to the public which of these run a stage."

So in the case of *Perkins v. Lyman*, 9 Mass. 522, where the agreement that the defendant would not be interested in any

1. 5 T. R. 118.

voyage to the north-west coast of America for seven years was held good. The court said, the principle relied on to show the invalidity of the agreement, as against the policy of the law being in restraint of trade, did not apply. This is a trade but lately discovered, and can be beneficial to but a small number of adventurers. One adventurer may engage to retire from it for a valuable consideration. Instead of an injury to the public, the community may receive a benefit from such a procedure, as it will go to prevent the trade from being overdone, and so becoming profitable to none. The case of *Parker v. Brown*, Cro. Jac. 612, seemed to be mainly relied on by the plaintiff's counsel. The parties being both applicants to the sheriff of Middlesex for the office of under-sheriff, the defendant, in consideration that the plaintiff would desist, promised, if he obtained the office, to pay him a sum of money. The court held the consideration to be lawful, and the promise valid. Whether such a consideration would at the present day be deemed sufficient and legal might perhaps admit of question. But taking the case to be correctly decided, there is nothing in it which bears analogy to the matter now in discussion. Neither the sheriff nor the public were or could be prejudiced by the withdrawal of one of the applicants. No competition was to be fostered. Public policy did not require the anxious rivalry of candidates perhaps; indeed, was best promoted by leaving the sheriff to unbiased and unsolicited selection. There was no interest either public or private which could suffer from the absence of competition.

It was farther said, that the policy to defeat which is forbidden must be general in its nature; as a contract to trade nowhere, or not to marry at all, is bad, while a contract not to trade in a particular place, or not to marry a particular person, will be sustained. But most of the cases referred to furnish an answer to this argument. While they show that some specified cases are not against public policy, and, therefore, are not illegal, they prove that a contract which does contravene it will not be enforced. These cases, therefore, directly apply to the contract before us, if it has been made to appear that it is against public policy; otherwise, it is admitted, they do not apply. The real question is not whether the contract be general or special, but whether its object is reproachable. The agreements respecting actions which have been condemned were not to abstain from bidding at all auctions, but in a specific instance. Moreover, a contract whose tendency is directly to

prejudice a third person, whether general or particular, can meet with no countenance.

The plaintiffs' counsel further contends that the arrangement made between these parties can not be wrong, because they might have united, made joint proposals, and thereby avoided collision as the defendants had done, and had become joint contractors. But the cases are widely different. The union of persons openly making a joint proposal is fairly communicated and avowed to the postmaster-general. Such a union may serve to insure a faithful, regular, and able transportation of the mail. The postmaster-general holds the responsibility of all who are to derive emolument. No one reaps the reward without sharing the risk. A joint offer openly made enables him to decline it if thereby the public interests may be best promoted. He may improve its advantages, and guard against its inconveniences.

I am of opinion the consideration of the promise made by the defendants was unlawful; the plaintiffs are not entitled to recover; and the verdict ought to be set aside, and without the payment of costs.

FORD, J. In pursuance of an advertisement of the postmaster-general of the United States, that he would receive proposals for a contract to carry the mail between Philadelphia and New York, these parties both repaired to Washington, where the defendants, finding no rival applicants in attendance but the plaintiffs, came to a private agreement to pay them a thousand dollars if they would not themselves propose to carry the mail, nor procure others to do so, on any part of that route, for the next ensuing contract; it was for non-payment of the money so promised that the plaintiffs brought the present action. The jury found a verdict for the plaintiffs, but it was understood to be subject to the opinion of the court at bar on several points that were offered for a nonsuit at the trial of the cause. Accordingly the defendants moved for a new trial upon those grounds, and upon an allegation that the verdict is contrary to and against the weight of evidence.

The first ground for a nonsuit was one that grew out of an objection to the declaration, for stating the consideration of the promise differently from the statement of it in the article of agreement. The article, after stating the foregoing promise, contained a further agreement that the defendants should take of William Gulick, one of the plaintiffs, two mail-coach teams and his proportion of the mail-coaches, then running on the

line, at an appraisement to be made by three men, to be mutually agreed on between the parties; the taking of which teams and coaches was argued by the defendants to be a part of the consideration on which they agreed to pay the thousand dollars, and yet no mention of those teams and coaches is stated in the agreement as set out in the declaration. I think, however, that the objection is founded on an erroneous conception of the agreement. In consideration that the plaintiffs would not propose for the carriage of the mail, the defendants took upon themselves two things: to pay the plaintiffs a thousand dollars, and to take of one of the plaintiffs his teams and coaches at a valuation. The whole consideration was that the plaintiffs should not propose, and this is set out in the declaration; but it was not necessary to set out more promises than those for the breach of which the plaintiffs demanded recompense; as where, for a certain consideration, the declaration laid the promises to have been that the defendant would deliver him a horse worth eighty pounds, which should be a young horse; and the agreement produced was that he should be a horse worth eighty pounds, and a young horse, and be warranted to be sound, and never to have been in harness, yet the declaration was holden to be good: 1 Chit. 299; *Miles v. Sheward*, 8 East, 7.

The second ground alleged is that this contract was contrary to public policy, contrary to the provisions of the act of congress, and therefore a *nudum pactum* that would not support an action. It can not be doubted that the contract was *nudum pactum*, if the consideration was illegal and against public policy, for an illegal consideration is as none. Was it, then, illegal as being against public policy? It is certain that the postmaster-general is not allowed to contract for the carriage of the mail in a private way; the act of congress makes it his duty to offer the contract to public competition, by advertising for sealed proposals, the reasons for which requirement, though not stated in the act, are exceedingly obvious. It tends to destroy favoritism in the bestowal of these great money contracts, by obliging the officer to accept the lowest proposals, or to stand responsible, upon the most weighty reasons, to the government and the public for rejecting them; it affords an equal opportunity to every citizen who thinks he can transport the mail on terms beneficial to the public, to offer his services; it is the best source of information for the officer, and enables him to procure the services at the lowest expense of public money.

A law thus equal towards the citizens, forming a check on favoritism and corruption in office, and tending to economy in the disbursements of a great department in the government, was worthy of the wisdom of congress, and a court of law can countenance no contract which tends to circumvent or subvert its policy. It did seem to me, on first thoughts, without time for much reflection during the trial, or for any examination of books, that a restraint on the freedom of men to propose or not, for such a contract, was inconsistent with the freedom of the citizen who must be at liberty to do therein as he pleases. On further consideration, I am still in favor of that freedom; the great objection to the contract is, that it would restrain the plaintiffs from doing as they might wish, and forcing them not to propose, while everybody else was free to do so. The contract imposes on them a restraint from which nothing can set them free, if it be not a legal nullity. The act of congress is built on the freedom of men to propose or not, and a contract in direct restraint of that freedom necessarily counteracts the policy. We find that the plaintiffs went to Washington intending to propose for the carriage of the mail on this route, and would have done so agreeably to the policy of the act if this contract had not interfered with that policy. And I am prepared to think that it went to the utmost extent in counteracting the policy of the act and the interest of the department.

If there had been twenty applications for this contract, a combination between two, binding only one of them not to propose, would have left nineteen in the field for competition; whereas here were only two applicants, and this restraint on one of them destroyed the whole of that competition which it was the policy of the law to excite and encourage. If the secret had been kept a few hours longer, the defendants would have obtained an entire monopoly, and the department would have paid one thousand five hundred dollars more than the service was worth, one thousand of which would have been sunk in this illegal contract. A clearer case of the repugnance of a contract to public policy can hardly be imagined, when it undergoes a deliberate examination. Now, it is an immutable principle that a contract contrary to public policy is void: Comy. on Contr. 26. Thus if a statute prohibit the smuggling of goods, and a contract be made between two persons for carrying it on, one of whom afterwards refuses, or goes on and takes all the profits to himself, he may keep them all, for the law will never enforce the contract against him: Comy. on

Contr. 38. So if two or more persons combine not to bid against each other at an auction, it is a contract tending injuriously to affect the value of sales at auction, and therefore is void as against public policy. Thus in the case of *Doolin v. Ward*, 6 Johns. 195, the parties being both anxious to purchase certain goods at auction, agreed not to bid against each other, but that Doolin should bid and divide the profits equally with Ward; he bid off the goods, and the clear profits amounting to one hundred and eight dollars. Ward sought to enforce this contract at law, but the court refused upon the ground of its tending injuriously to affect the value of sales at auction, and being against public policy it was a void contract. The case of *Wilbur v. How*, 8 Johns. 444, is to the same effect. It was argued that there is no similarity between bidding at auction and a proposal or bidding for the carriage of the mail, because the postmaster-general is not bound to give the contract to the lowest proposal, but might reject them altogether if he deemed them all to be too high. It is still an auction, with limitations or conditions, which are neither unlawful nor unusual if made public before the sale; thus the owner of goods may give notice that they will not be considered as set up under a certain sum, or he may reserve a right of bidding once on them himself: 1 Comy. on Contr. 257; *Bezwel v. Christie*, Cowp. 395. These conditions do not at all destroy the auction, which remains a bidding or proposing subject to these conditions, by way of competition, as much as if the modifications did not exist. It was also argued from a case in *Parker v. Brown*, Cro. Jac. 612, that as withdrawing from competition for the office of under-sheriff was holden to be a lawful consideration for a contract, so withdrawing from competition for a contract to carry the mail can not be considered as unlawful; whereas it is the policy of the law to encourage competition in one case, while it is indifferent to it in the other. It is no fraud, either on the sheriff or the public, to restrain a person from being an applicant for the office of under-sheriff, because public policy is not interested in competition in that case as it is in this and in sales by auction. For these reasons, I am of opinion that no action will lie on this contract, and that there ought to have been a nonsuit. This renders it unnecessary to inquire, in the second place, whether the plaintiffs did not, by the nature of their measures and advice, virtually and substantially procure other persons to propose for the conveyance of the mail on this route, who but for such measures and advice would not have done it.

My impressions from the evidence, at the time of the trial and even now, would lead me to submit this point again to the consideration of a jury. Let there be a new trial.

DRAKE, J. The consideration of the contract declared on in this case is objected to as insufficient and against public policy. And, in the first place, I am strongly inclined to consider it insufficient. The postmaster-general, agreeably to the act of congress, had advertised for offers to carry the United States mail, and was ready to accept the lowest offers made by a certain time. The parties were attending at Washington with the view to bid, when they entered into this contract, the consideration of which is, that the plaintiffs should forbear to offer themselves, or procure others to offer to the postmaster-general to carry the United States mail on the route between New York and Philadelphia. Now, what was it that was yielded by the plaintiff? No property nor services, no vested interests of any kind. A right of bidding to be sure; but had that right any inherent value? Nobody can say that it had. It must not be supposed to have been worth one thousand dollars. That was not agreed to be given for the right of bidding. Had that been exercised, it is probable it would have proved to be worth nothing. Had both these parties bid, that one thousand dollars, and probably more, would have remained, not with the plaintiffs, but in the public treasury. Nothing was parted with but a bare possibility of making a speculation. The parties found themselves so circumstanced, that by an agreement they were enabled to take from the pocket of a third party, and put it into that of the defendants, a large sum of money, to which neither of them had previously any title. It can not be well said that the plaintiffs were prejudiced by losing what they never had; and although the defendants may have been benefited, yet it was by the property or services of the plaintiffs. This case differs from those in 4 East, 190, 5 T. R. 118, and others to be found in the books, where a person by assiduity, skill, and integrity in the exercise of a trade or profession, has procured a valuable business, and which he may reasonably expect to retain by the same means. Here is a power of acquiring property fairly obtained, the fruits of which ripen into maturity and enjoyment in the ordinary course of events, to relinquish which is a prejudice to the party abandoning, and an almost certain benefit to him who is expected to succeed to the business. And as respects the public, they may possibly be injured and possibly benefited. At any rate, the injury to the public is too trifling and too

uncertain to require any interference with bargains of this kind; and there being a positive prejudice to one party and benefit to the other, the consideration is considered sufficient.

But whatever I might conclude as to the sufficiency of this consideration, if the contract were entirely harmless, I am decidedly of opinion that it is illegal, being contrary to public policy. "A contract to do that which is injurious to the community is void by the common law." 2 Wilson, 350. Now, this contract is to pay the sum of one thousand dollars to the plaintiffs upon condition that they will abstain from doing an act which shall enable the defendants to make that sum, or more, out of the community; that is, to prejudice the public to that amount, or more. The gain to the defendants by this contract, added to the one thousand dollars, is the precise measure of the injury to the public: an injury directly contemplated by the contract, and forming the consideration for it, if it have any. It is not necessary in this case to argue that danger to the public interests is to be apprehended from this species of contract; the contract itself contemplates that injury, and ascertains the amount when it fixes the value of the contract; or rather, it points out the sum below which, in the opinion of all the parties, the loss to the public can not fall.

Let the rule to show cause be made absolute.

THAT A CONTRACT PROHIBITED BY STATUTE, or for the performance of any act forbidden by law, or tending to defeat the general purpose of any statute, is itself void, and can not be the foundation of an action at law, is well sustained by the authorities: *Mitchell v. Smith*, 2 Am. Dec. 417; *Jones v. Caswell*, 2 Id. 134; *Nichols v. Ruggles*, 3 Id. 262; *Yeomans v. Chatterton*, 6 Id. 277; *Seidenbender v. Charles*, 8 Id. 682, and the note thereto; *Wilson v. Spencer*, 10 Id. 491; *Hibernia T. Corp. v. Henderson*, 11 Id. 593; *Gray v. Roberts*, 12 Id. 383, and note thereto; *Morton v. Fletcher*, 12 Id. 366; *Milne v. Davidson*, 16 Id. 189. The same rule obtains with reference to contracts which, whether specially forbidden by the statute or not, are clearly against public policy: *Jones v. Caswell*, 2 Am. Dec. 134, and note; *Rogers v. Waller*, 9 Id. 758; *Swayze v. Hull*, 14 Id. 398; *Pingry v. Washburn*, 15 Id. 676; and in some instances, with reference to contracts in restraint of trade: *Pike v. Thomas*, 7 Am. Dec. 741 and note; *Pierce v. Fuller*, 5 Id. 102.

CONTRACTS REGARDING THE LOCATION OF DEPOTS. — Contracts entered into with railroad corporations by which they agree not to construct or maintain depots in certain designated localities, or to maintain depots in particular places, in consideration of money or property by them received, have been held to be against public policy, and therefore void whenever the fulfillment of the contract would prevent the corporation from discharging its obligations to the public: 10 Cent. Law Journal, 298, referring to *Williamson v. Chicago & Rock Island, etc., R. Co.*, decided by the supreme court of Iowa, March 18, 1880; *St. Joseph & Denver City R. R. Co. v. Ryan*, 11 Kan. 602;

15 Am. Rep. 357; *Pacific R.R. Co. v. Seeley*, 45 Mo. 212; *Marah v. Fasling*, 64 Ill. 414; *Boston v. Walins*, 60 Id. 133; *Fuller v. Dame*, 18 Pick. 472; *Holliday v. Patterson*, 5 Or. 177; *Jacksonville & etc. R. R. Co. v. Mathers*, 71 Ill. 592.

AN ASSOCIATION FORMED TO PURCHASE LAND at the public sales of the United States, and by preventing competition, to resell them at a profit, is unlawful, because it contravenes public policy. A bond given to such an association for lands sold by it was held to be void by the supreme court of Alabama, in *Carrington v. Caller*, 2 Stew. 175, in which case very lengthy and exhaustive opinions were delivered by the judges.

THE STATE v. GUILD.

[5 HALSTED, 163.]

A VERBAL CONFESSION OF GUILT, INDUCED BY A DELUSIVE HOPE OF IMPUNITY from punishment, will not be received in evidence.

WHEN A CONFESSION IS OBTAINED BY UNDUE INFLUENCE, a subsequent confession made by the same person, is presumed to flow from the like influence, and will not be admitted in evidence, unless this presumption is first overcome by other testimony.

SUBSEQUENT CONFESSIONS.—Although an original confession may have been obtained by improper means, subsequent confessions of the same or of like facts may be admitted, if the court believes, from the length of time intervening, from proper warning of the consequences of confession, or from other circumstances, that the delusive hopes or fears, under the influence of which the original was obtained, were entirely dispelled.

THE UNCORROBORATED CONFESSION of a prisoner, when proved by legal testimony, and when the *corpus delicti* is otherwise established, is sufficient to warrant his conviction of the offense confessed, though the punishment be death.

“CORROBORATING CIRCUMSTANCES,” used with reference to a confession, are such as serve to strengthen it, and to impress the jury with the belief of its truth.

THE CONFESSION OF A BOY, twelve years and five months of age, may justify his conviction and execution for the crime of murder.

THIS case was tried in May, 1828, at the Hunterdon oyer and terminer. The jury rendered a verdict by which the defendant was found guilty of murder. After the verdict Mr. Scott, on behalf of the prisoner, moved the court to defer judgment until the next term of the oyer and terminer, in order that the advisory opinion of the supreme court, upon the questions of law, discussed and determined during the progress of the trial, might be obtained. The motion was granted, and at the September term the case was argued and submitted to the supreme court. The facts material to the decision are stated in the opinion of the court.

Clark and Saxton, for the prisoner.

The confession made by the prisoner is inadmissible, and so is the written examination. The confessions made in jail, five months after the commission of the offense, ought also to be rejected, because it must be presumed that they were tainted with the same inducements which operated upon the mind of the prisoner when the former confession was made: *King v. White*, 2 Stark. Ev. 49; *State v. Aaron*, 1 South. 240 [7 Am. Dec. 592]. The confessions, even if competent, are not sufficient to convict the prisoner, because uncorroborated by circumstances: *State v. Aaron*, 1 South. 240 [7 Am. Dec. 592].

W. Halsted, for the state.

The fact that a person having no authority holds out inducements by which a confession is obtained, is not sufficient to exclude it from evidence: *Rex v. Gibbons*, 1 Carr & Payne, 97; 11 Eng. C. L. Rep. 327; Wel. 343; *Rex v. Tyler*, 1 Carr & Payne, 129; Carr Crim. Law, 65; *Rex v. Rowe*, Russel & Ryland, C. C. R. 153; and 4 Dall. Rep. 116; *Commonwealth v. Dillon*, 2 Stark Ev. 50, note q. The confessions, if competent, were sufficient to convict, the *corpus delicti* being otherwise proved: *Wheling's Case*, Leach Ca. 311, note, 2 Hawk. 595; tit. Ev. book 2, c. 46, sec. 37, Carr Crim. Law, 64; Russ. & Ry. C. C. R. 440; Ph. Ev. 80. If sufficient to convict an adult the confessions must produce a like result in the case of this defendant: 1 South. 245-6.

The following opinion of the supreme court, drawn up by Chief Justice Ewing, was communicated to the ensuing court of oyer and terminer, in October, 1828.

By Court, EWING, C. J. The prisoner, James Guild, was, at the oyer and terminer for Hunterdon county, in May last, found guilty of the murder of Catharine Beakes. The court, at the instance of his counsel, humanely suspended the sentence of the law, in order that the opinion of the supreme court might be obtained, on some legal points which arose in the progress of the trial. These points were submitted to the court in the term of September, by the prisoner's counsel, with distinguished ability, and with the most laudable zeal, research, and industry; and they have received from the court the careful, anxious, and mature examination which their interest and importance, the situation of the prisoner, and the due administration of public justice required.

The first question to be considered respects the admissibility of certain confessions of the prisoner which were received in evidence.

The deceased came to her death in the afternoon of the twenty-fourth day of September, 1827. An inquest over the body was held by the coroner, at her place of abode, in the evening of that day. The prisoner, who was known to have been at work alone, on the same afternoon, in a cornfield on the opposite side of the road, was brought up by a constable, and, on being twice asked, denied that he knew anything of the manner of her death. About ten o'clock on the next day he made a verbal confession, that he had killed the deceased, to Charles McCoy, and others, and shortly after a similar confession to one of the justices of the peace of the county, by whom it was reduced into the form of a written examination. The verbal confession and written examination, which took place within a short period of each other, were rejected by the court when offered in evidence, because induced, as the court believed, by delusive hopes of impunity excited, not by the justice, who appears to have acted with exemplary circumspection in the discharge of his duty, and without even a knowledge of the promises which had been made, but by other persons innocently misled by a common, and perhaps natural, but mistaken zeal to discover the perpetrator of a cruel and shocking outrage. The occasion does not call for an examination at large of the propriety of the rejection of the proposed proof of these confessions. It is enough to say that the rule of law, by which the court was governed, was sound, and there appears to have been enough of fact established to warrant the court in applying the rule to the exclusion of the evidence.

Confessions were made by the prisoner, in February succeeding, nearly five months after the perpetration of the offense. These confessions were admitted in evidence. The counsel of the prisoner insist that the admission was illegal, because confessions of a like nature had been previously made under the influence of hope; and because these confessions *per se* and independent of the others were themselves made under the same delusive influence, and with an expectation that by perseverance in their narration he should escape from punishment, and also under the excitement of anger from reiterated taunts and accusations thrown out to him when in gaol.

The first of these grounds, the counsel of the prisoner sought to sustain by a reference to the recent and valuable treatise on

evidence, by Starkie, who says in part 4, p. 49, tit. Admissions: "Where a confession has once been induced by such means, (threats or promises), all subsequent admissions of the same, or of the like facts, must be rejected, for they may have resulted from the same influence." In examining the soundness of this doctrine, a shade of doubt is at once thrown over it by the fact that no such rule of evidence is to be found either in the ancient reports or in the elder writers. Neither Hale, nor Hawkins, nor Gilbert, nor Foster, nor Bacon, nor Comyns, state any such rule. It is first laid down, so far as my research extends, by East, in the second volume of his *Pleas of the Crown*, 658. He cites no case, refers to no authority, but says it is the common practice to reject such subsequent confession. Starkie refers only to a manuscript case of *Rex v. White*, in Michaelmas term, 1800; but by whom decided, or in what court, or under what circumstances, he does not relate. It can not be expected, therefore, that we should yield an implicit deference to this position without an examination of the principles on which it rests; and such an examination will show it, as broadly and unqualifiedly stated, to be unsound and unworthy of confidence. The reason given for the rule by Starkie is, that the subsequent admissions may have resulted from the antecedent influence. But in all sound logic the question must turn, not on the possibility, but the presence of influence; not whether influence once existed, but whether it continued to exert its force. By the rule, as stated by Starkie, the single inquiry would be: Has a previous admission been made under improper influence? And if the answer be affirmative, the subsequent confession must be rejected, however thoroughly, in the mean time, the mind of the accused may be freed from such influence, and however perfectly truth and freedom of volition may have resumed their sway. Surely such a rule can not prevail unless it be shown that the human mind having once lapsed into falsehood, must, by a necessity of its nature, persevere without motive or inducement. For if it be true, and the assertion will receive on all hands a prompt and ready assent, that a man having, under given circumstances, made either a false or a true statement, may, under other circumstances, retract his allegations, and with equal assurance assert the converse of his previous declarations; then it follows that the true criterion is the actual state of mind of the accused at the time the confessions were made, and the true question for solution, whether, at that time, he was under undue influence of hope or fear. It is readily admitted that the antecedent hopes

or fears, or other sources of influence, are to be brought into account and weighed. It may even be conceded that when once a confession under influence is obtained, a presumption arises that a subsequent confession of the same nature flows from the like influence, and that such presumption should be overcome before the confession ought to be given in evidence. But such presumption being satisfactorily repelled, the evidence ought to be received. The rule stated by Starkie, as it goes further, is erroneous. It makes the presumption a conclusive and impregnable bar, and if understood in its broad terms, excludes the proof, whatever subsequent circumstances to remove the influence may have intervened.

From a careful examination of principles, then, we are prepared to yield a full acquiescence to the doctrine laid down by Justice Drake, on this occasion, in his charge to the jury in these words: "Although an original confession may have been obtained by improper means, subsequent confessions of the same or of like facts may be admitted if the court believes from the length of time intervening, from proper warning of the consequences of confession, or from other circumstances, that the delusive hopes or fears, under the influence of which the original confession was obtained, were entirely dispelled."

The rule of evidence seems to have been thus understood, and has certainly been so practiced, in the criminal courts of this country. In *Williams' case*, 1 City Hall Recorder, 149, the mayor, Radcliff, of New York, submitted to the jury to decide whether an examination in writing, taken in the police office, had or had not been made under the influence of the threats which had preceded and induced a previous confession to the prosecutor, and accordingly either to receive or reject a written confession. In the case of *Bowerhan and others*, 4 C. H. Rec. 138, the mayor, Colden, said to the jury: "It appears that in the first instance, an oral confession was made, manifestly under the influence of a promise of favor, and subsequently an examination was taken in the police office in the usual manner." Here no threats or promises were made, nor does it necessarily follow that because the oral confession was made under the influence of promises, that the written examination stands in the same situation, but it will be for the jury to determine, from all the facts, whether the promises previously made continued their influence on the prisoner's mind at the time of the written examination; for, if so, then it is to be entirely rejected. The defendant, who had made the confession, with some of the others

was found guilty. In the case of *Mills and others*, 5 C. H. Rec. 178, the mayor, Colden, charged the jury in a similar manner. In *Millegan and Welchman's case*, 6 C. H. 78, Mr. Recorder Riker, on an objection to evidence, recognized the same principle.

The true rule of evidence being thus shown, we proceed to the second ground of objection raised by the prisoner's counsel, and inquire whether the court had reason to believe that the delusive hopes under which the original confession may have been obtained were entirely dispelled? Whether, when the confessions, given in evidence, were made, the mind of the prisoner was laboring under or was freed from undue influence? These questions present pure inquiries of fact. What, in point of fact, was the actual state of mind of the prisoner? We have seen that the court of oyer and terminer acted under a correct view of the law, that they prosecuted their search into the facts on sound legal principles, and that they compared the facts before them with a correct legal standard. Now, the duty of this court when a reference, like the present, is made to us by that tribunal, is chiefly to examine and revise matters of law. So, in England, when the advice of the twelve judges is required. We can not review a question of fact with those advantages possessed by the court, before whom the witnesses have appeared. To pass in judgment on the conclusions of that court, we ought to stand, if not on superior, at least on equal ground. Such a point of view may be obtained in the examination of legal principles; but it is rarely accessible in the search of facts. Hence, on this occasion, we might, after an investigation of the legal doctrines, desist, on this head, from further inquiry. But after expressing, as we are bound to do, a just deference for the determination of the court, we shall proceed to examine it under such lights as the report of the case affords us.

A period of between four and five months elapsed between the first confession and those which were afterwards made by the prisoner and received in evidence against him. In point of time, then, the court may well have supposed there was sufficient room for the first impressions to have subsided, and for the gleams of hope by which, at the outset, he may have been cheered, to have been dispelled. Soon after the prisoner was brought to gaol, John Thompson, Esq., one of the magistracy of the county, had an interview with him, and told him he must abide the consequences of the act which he had confessed, and that he could not hope to escape. It is very probable the prisoner was not aware that he who thus addressed him was a

justice of the peace, yet he could not fail to observe his age, and his grave and venerable appearance so likely to excite attention to his remarks. On Saturday morning succeeding the arraignment of the prisoner, he was visited by Daniel Cook, Esq. With his person and official character, he was doubtless acquainted, for he was the same person before whom the examination in writing of the prisoner had been taken. He told the prisoner that he must expect death, and prepare to meet it, and he mentions a striking fact serving to show the effect produced by the admonition. His countenance changed. His mind received and was touched by the awful warning of anticipated suffering. The delusion of hope was at the least shaken. By Charles Bonnel, Esq., another magistrate, who sometimes saw him in gaol, he was cautioned against making acknowledgments to the boys as he was accustomed. If, upon his arrest, any delusive hopes induced his confession, the disappointment which so soon succeeded would very naturally have removed them. Instead of being better off, he saw his condition become worse. Instead of being clear, he was placed in gaol, he was indicted, publicly arraigned, and assured by a respectable magistrate that punishment would certainly overtake him. Such a failure of ill-raised expectations would be apt to produce a revulsion of feeling. Confession had done him no service, had produced no alteration of his sufferings; had obscured instead of brightened his prospects of escape and impunity. What motive then to persevere in the avowal of his guilt? Such avowal had availed him nothing, and what hope then could have remained that any further confessions would be more beneficial? Instead of realizing the anticipation of safety, he found these confessions had brought him positive assurances of a melancholy doom. When, then, he persevered in making these confessions, it is a most reasonable inference, that he was actuated by some other motive than the undue influence of previously-conceived hopes of impunity. His counsel said, on the argument before us, that having once made the confession, it was natural for him to persevere in the same tale. Such may be the result, if the confession were true. But a steady adherence to falsehood, which he saw produced him no benefit, and was assured would consign him to death, can not, it is believed, be reconciled with any ordinary principles of human conduct.

The counsel of the prisoner further insisted, that the taunts and reproaches to which he was repeatedly exposed from idle boys, who came to the door or passed by the window of his gaol,

tended to keep up in his mind an excitement unfavorable to the return of cool reflection. But the remarks made by him in any such moments of irritation, were not the confessions which were proposed as evidence on the part of the state, and whose admissibility is under consideration. And however he may have been led to reply harshly to remarks equally harsh and thoughtless, to answer the fool according to his folly, it does by no means result, that the same temper would be felt towards the numerous, and some of them very respectable persons with whom he conversed, and in a manner apparently serious and deliberate, related the melancholy tale. The idea that he saw in every person who approached him an enemy, and therefore persevered in an avowal of the crime, is far more fanciful than just. Even a child would be prompted to silence in the presence of one whose hostility he knew or believed. If anything escaped, the remarks would be few, even if harsh; but for such a person to avow a crime, to relate its most minute details, to expose himself thereby, as he was repeatedly assured, to imminent danger of the most severe punishment, and the whole story to be a total falsehood, is inconsistent with nature and repugnant to credibility.

Upon a careful view, then, of the circumstances of the case, we find no reason to disapprove of the conclusion in point of fact which was drawn by the court, or to doubt of the propriety of their determination to submit these confessions to the consideration of the jury; and the more especially as the court gave to the prisoner the advantage of a review of these facts by the jury, and expressly charged them that "it was their business to consider the confessions with reference to the manner in which the first confession was obtained, and if they were not satisfied that the latter confessions were made freely and understandingly, and wholly free from any expectation of benefit, raised by the hopes and promises preceding the first confession, or from his continuing to tell an uniform story, it was their duty to reject them from their minds, and not to make them the foundation of their verdict."

It may not be without utility to speak a word on a topic briefly adverted to by the counsel at the bar, whether the admissibility of confessions objected to as improperly obtained should be decided exclusively by the court, or should be submitted to the jury, to consider the question of fact and to reject or weigh them accordingly. The practice of the courts of criminal judicature on this head has not been altogether

uniform. Hawkins, book 2, c. 46, sec. 36, says, a confession obtained by the flattery of hope, or the impression of fear, is not admissible evidence. In *Rex v. Woodcock*, Leach (4th ed.) 500, Chief Baron Eyre admitted declarations of a deceased person, and left it to the jury to consider whether the deceased was not in fact under the apprehension of death, though she did not seem to expect immediate dissolution; and said, if they were of opinion she was, the declarations were admissible; and if of a contrary opinion, they were inadmissible. In *Rex v. Hucks*, 1 Starkie, N. P. 521, Chief Justice Ellenborough said, that upon a question proposed to the judges there by the judges in Ireland, who entertained doubts on the subject, they were unanimously of opinion that when a declaration had been made by a party in *articulo mortis*, whether under all the surrounding circumstances the declaration was admissible in evidence, was a question exclusively for the consideration of the court. In the cases in the mayor's court of New York, above mentioned, the question of fact was submitted to the jury. In *Aaron's case*, 1 South. 240, Chief Justice Kirkpatrick said: "If the confession, however, rested upon the ground of hope and fear alone, doubtful as it might be, I should have been inclined to yield to its competency, and to leave it to the discretion and judgment of the jury." In many cases, both in this state and in our neighboring states, courts have wholly rejected confessions when clear and unequivocal evidence of undue influence was discerned. It is unnecessary, however, for the sake of the present case, further to pursue this subject, for if the decision should be made by the court, such decision was made; and if proper for the jury, it was submitted to them in the most free and unbiassed manner. Of the opinion of both court and jury on this point, then, the prisoner enjoyed the advantage.

We are now to examine, under the request of this court of the oyer and terminer, whether the evidence in the case was sufficient, in legal contemplation, to warrant the conviction of the prisoner. In the first place it is insisted by his counsel that a verdict ought never to be founded on naked and uncorroborated confessions; and to support this position they have in a great measure relied on the opinion expressed by Justice Rossell, in *Aaron's case*, 1 South. 242, "that no person indicted for a capital offense shall be convicted on his own confession, without a single circumstance to corroborate it." If the learned judge is to be understood to mean, when the *corpus delicti* is

not otherwise proved, as when in larceny no proof is given of the taking of the goods, or in murder, the fact of the death is in no wise shown, and when the whole case depends on the mere confession of the accused, a number of cases will be found to support the doctrine. But if he is to be understood that even when the *corpus delicti* is otherwise established, the confession of the prisoner alone is not sufficient, if the jury believe it to be true, to produce a conviction, the opinion stands opposed to very high authority. The only case referred to by the judge is from Leach's Crown Law, 320, *Alexander Fisher's case*. This citation was evidently made from the first edition of Leach; and Justice Heath, on a trial at the assizes, is there reported to have laid down the rule in substance as above stated. But *Fisher's case* was misreported by Leach in that edition, and is one of the many errors which he says, in the preface of his subsequent edition, that he has corrected. In the fourth edition published in 1815, vol. 1, p. 311, the same case is to be found, and the point decided, as there reported, is wholly different. "There was no other evidence," says the Reporter, "to fix these facts upon the prisoner than his confession made upon his examination before the committing magistrate; and there being no evidence that this confession was not reduced into writing, *viva voce* testimony of it was rejected." In the same page Leach reports the case of John Wheeling, tried before Lord Kenyon, at the summer assizes at Salisbury, 1789, in which it was determined that "a prisoner may be convicted on his own confession, when proved by legal testimony, although it is totally uncorroborated by any other evidence."

Hawkins, book 2, c. 46, sec. 36, says: "If a confession be voluntarily made, and regularly proved on the trial, it is sufficient if the jury believe it to be true, to convict a prisoner, without any corroborating evidence to support it." Phillips, in his treatise on evidence, says: "A free and voluntary confession made by a prisoner to any person at any time or place is strong evidence against him, and, if satisfactorily proved, sufficient to convict without any corroborating circumstance:" 1 Phil. Ev. 81. And afterwards he says: "It appears now to be an established rule that a full and voluntary confession by the prisoner of the overt acts charged against him on indictment for treason is of itself sufficient evidence to warrant a conviction:" *Id.* 85.

Starkie says, a "prisoner may be convicted on his own confession, without other evidence:" Starkie's Ev. part 4, p. 53. An opinion on this point need not, however, be here expressed,

nor need the inquiry be further prosecuted, for it will, I think, be demonstrated in the sequel that the confessions are "strong and pregnant, disclosing and bringing forth facts and circumstances," and that there are circumstances corroborating these confessions of a peculiarly pointed and persuasive character. In the first place, however, it becomes material to a correct understanding of the subject to settle what is meant by the qualification "corroborating," annexed to the term "consequences." The phrase clearly does not mean facts which, independent of the confession, will warrant a conviction, for then the verdict would stand, not on the confession, but upon those independent circumstances. To corroborate is to strengthen, to confirm by additional security, to add strength. The testimony of a witness is said to be corroborated when it is shown to correspond with the representation of some other witness, or to comport with some facts otherwise known or established. Corroborating circumstances, then, used in reference to a confession, are such as serve to strengthen it, to render it more probable, such, in short, as may serve to impress a jury with a belief of its truth. In this view of the subject, the evidence in this cause affords circumstances corroborating, in a singular and remarkable manner, the confessions which were proved. I shall briefly state them. The prisoner said he went to the house of the deceased, for the purpose of borrowing a gun. It was proved a gun had been kept there, and that the prisoner knew it. He said she refused him the gun, and accused him of having done mischief to her pig and pigeons. It was proved that she had entertained a belief that such mischief had been done by him. He confessed he had struck her with a yoke. The witness who first saw her after the disaster, testified that he found a yoke, and blood on it, lying near her. The prisoner confessed that as he was going out, after she had refused his request, he saw the yoke by the door, picked it up, and went back.

Jonathan Vankirk, who resided in the house, testified to the jury that when he went out about noon to work, the yoke was by the side of the door. The prisoner stated that she was on the hearth. McCoy, the first who saw her, found her lying in the corner of the fire-place. He stated that she was starching a cap. A cap, says McCoy, lay on the hearth by the side of her. To Philip Knowles he related the story, and confessed he struck her a first, second, third, and fourth time. McCoy testified there were four wounds; one on top of her head, one on

the right temple, one on the right eye, and one on the under jaw. The minute detail of incidents, and the steady uniformity of his relations to a number of persons, are not among the least striking of the circumstances which mark these confessions. One supposed discrepancy only has been observed, or pointed out. To one of the witnesses he said, the deceased was sitting by the fire, blowing the fire. To another, that she was starching a cap, and stooping down on the hearth. No difficulty, however, seems to exist in reconciling these representations, by supposing that he spoke of different points of time.

In this view of the case, a most marked difference from that of Aaron, on which the prisoner's counsel placed much reliance, can not escape observation. No attending circumstance stated by him was proved to have existed; and although before the coroner's inquest, and for three or four weeks after he was put in jail, he continued to make the confessions, yet afterwards, and until the time of trial, he steadily denied the truth of what he had confessed.

In the charge to the jury, the court say, "there are some coincidences between the facts detailed in his confession, and the real state of things, as testified by other witnesses; these would be strong proofs of guilt, if he could not have learned them from any other means, except by having gone to the house, and seen the body and other things as they really were. But his confessions were made long after there were other sources of information, and if you think it probable or possible that it was furnished from other sources, the evidence arising out of these coincidences will have but little weight." In this passage, as well as in every other part of a very judicious charge, we see the cautious and humane intentions of the judge that on so deeply important an occasion no proper considerations should be overlooked by the jury, and that everything which might justly have weight *in favorem vitæ* should be presented to their view. These considerations were earnestly urged before us by the prisoner's counsel. But that a youth like the prisoner should carefully treasure up from time to time the fragments of information which he might have heard; that he should weave them together into a connected and consistent tale; that he should uniformly and repeatedly relate them, and in the same manner, and all this, not as an avowal or argument of innocence, but as a declaration of atrocious guilt, was, in our opinion, very properly considered by the jury to be beyond all

reasonable bounds of credibility. And it could not have escaped their observation that in no particular, not even the slightest, was his confession contradicted, or found inconsistent with the facts, or in any wise disproved.

The age of the prisoner was earnestly pressed on our consideration by his counsel, who strenuously insisted he was too young to be exposed to punishment on such evidence. At the perpetration of the offense, he was aged twelve years and somewhat more than five months. The sound, sensible, and legal rule on this head is, in our opinion, judiciously as well as lucidly stated by Justice Southard, in the case of Aaron: "This capacity," says he, "to commit a crime, necessarily supposes the capacity to confess it. He who is a rational and moral agent, and can merit the infliction of legal sanctions, must be able to detail his motives and acts, and must be judged by them. If, therefore, the defendant was of an age to be punished, he was of an age to confess his guilt." These principles are conformable to the most approved and respected authorities. In Leach's edition of Hawkins, b. 1, c. 1, p. 1, in note, it is said: "From this supposed imbecility of mind, the protective humanity of the law will not, without anxious circumspection, permit an infant to be convicted on his own confession. Yet, if it appear, by strong and pregnant evidence and circumstances, that he was perfectly conscious of the nature and malignity of the crime, the verdict of a jury may find him guilty, and judgment of death be given against him." Blackstone says: "In very modern times, a boy of ten years old was convicted on his own confession, of murdering his bed-fellow; there appearing in his whole behavior plain tokens of a mischievous discretion, and as sparing this boy merely on account of his tender years, might be of dangerous consequence to the public by propagating a notion that children might commit such atrocious crimes with impunity, it was unanimously agreed by all the judges that he was a proper subject of capital punishment:" 4 Bl. Com. 23. The case mentioned by Blackstone is reported at large by Foster. The evidence was the confession of the boy, with some circumstances tending to corroborate the confession, but in one respect widely different from the present case; for one, and a leading, circumstance which he stated, was found to be entirely untrue: *York's case*, Foster, 70.

In regard to a youth of the years of the prisoner, the law most wisely requires the utmost circumspection from the jurors; and it is satisfactory to find that in the present case the jury were

distinctly reminded of their duty. "This fact," says the judge in his charge, "should make you more cautious in admitting the confessions, and induce you to resolve your doubts in his favor."

Under a deep sense of responsibility, after a careful deliberation, and feeling the strongest impression of the tenderness due to the life of a fellow-creature, we hold ourselves bound to advise the court of oyer and terminer not to grant a new trial, but to proceed to discharge the solemn duty which remains to them, by pronouncing the sentence of the law on the crime of murder.

The prisoner was sentenced and executed.

DEN EX DEM. OF ABER v. CLARK.

[5 HALSTED, 217.]

INQUISITION OF LUNACY is *prima facie*, but not conclusive, evidence against persons who are not parties to it.

AN INQUISITION OF LUNACY may be impugned by a third person by any competent evidence tending to show that the alleged lunatic was of sound mind at the period embraced in the inquisition. The procedure, technically called a traverse of the inquisition, need not be first pursued.

The facts are stated in the opinion of the court.

J. W. Miller, for the defendant.

Ira C. Whitehead, for the plaintiff.

By Court, EWING, C. J. In deducing title on the trial of this cause, the plaintiff gave in evidence a mortgage of the premises in question, made by one Hercules Aber, on the fifteenth day of February, 1812.

The defendant, to impeach the mortgage, gave in evidence a commission of lunacy, and an inquisition thereon, taken on the thirtieth of March, 1824, whereby it was found that the said Hercules Aber was on that day a lunatic, of unsound mind, and not enjoying lucid intervals, and had been in the same state of lunacy for the space of sixteen years, then last past, and upwards. Notice of the taking of the inquisition was not given to the holders of the mortgage, nor did they take any part therein.

The justice who held the circuit, decided that the inquisition was not conclusive evidence of the lunacy, and permitted the plaintiff to introduce witnesses, and they were introduced by

both parties, relative to the alleged lunacy of Hercules Aber, at the execution of the mortgage. The jury rendered a verdict for the plaintiff. The only questions submitted to us by the state of the case, prepared by the parties, are "whether the inquisition was conclusive as to the lunacy; and whether the court did right in admitting the testimony of the plaintiffs on that point."

In *Sergeson v. Sealey*, 2 Atk. 412, an objection was made before Lord Hardwicke, to the reading of an inquisition of lunacy, because offered as evidence to affect the right of a third person, and as it likewise had a retrospect of eight years. He overruled the objection, and said that "inquisitions of lunacy are always admitted to be read, but are not conclusive evidence; for you may traverse them, if you please." Witnesses were examined to encounter the inquisition, and in delivering his opinion on the case he said: "There is not at present, before me, sufficient evidence to satisfy me that he was absolutely a lunatic or *non compos*. When I admitted the inquisition to be read, I said it was not conclusive evidence; for it is not conclusive as to the point of time of taking the inquisition, much less as to the retrospect of eight years; for, notwithstanding such inquisition, there are numerous instances of a subsequent inquiry."

In *Ex parte Barnsley*, 3 Atk. 184, an application having been made to Lord Hardwicke to traverse a second inquisition, the first having been set aside for informality, he dismissed the petition, and among other things, said: "In all these inquisitions they are not at all conclusive, for they may bring actions at law, or a bill to set aside conveyances." In *Hall v. Warren*, 9 Ves. 603, a bill was filed to obtain the specific performance of an agreement executed by the defendant, and dated the ninth of March, 1802. On the eighth of May following, under a commission of lunacy, the defendant was found a lunatic from the first of May, 1792, with lucid intervals. One ground of defense was that he was insane at the time of the contract, and a great deal of evidence was gone into on both sides as to the state of his mind. The master of the rolls said "that inquisition having been taken in the absence of the plaintiff is not conclusive upon him. But it is evidence *prima facie* of the lunacy. It is, however, competent to third parties to dispute the fact and to maintain that, notwithstanding the inquisition, the object of it was of sound mind at any period of the time which it covers. An opportunity, it is said, has already been afforded of traversing the in-

quisition; and undoubtedly if it would have answered the plaintiff's purpose merely to have traversed and contradicted the finding, by showing that the defendant was not a lunatic, he ought to have embraced that opportunity, and it was unnecessary to have come here in the first instance. But if, as is said, he may have been a lunatic, with reference to the general state and habit of his mind, during a considerable space of time, but with lucid intervals, I doubt very much whether that could have been got at by a traverse. It was not, therefore, improper for the plaintiff, under these circumstances, to waive the opportunity of traversing, and to come here for an issue." He further observed that it was an inquiry much more fit for examination *viva voce* before a jury than upon written depositions, and ordered an issue. In *Faulder v. Silk*, 3 Campb. 126, in debt on bond, upon a plea of *non est factum*, to show the obligor to have been in a state of insanity when he executed the bond, an inquisition of lunacy, finding him a lunatic from a day prior to the date of the bond, without any lucid intervals, was offered in evidence. An objection being made as *res inter alias acta*, Lord Ellenborough said: "Although the inquisition was by no means conclusive on the trial of the issue, it was admissible, and that it would be for the jury, after comparing it with other facts in the cause, to determine what weight it was entitled to."

Maddox, in his treatise on chancery practice, states the following doctrine: "An inquisition is only presumptive evidence of insanity, and not conclusive, so that upon an action in respect to any contract or deed, it is for a jury to determine whether at the time of executing it, the party was *non compos*, though by the inquisition he was found to be *non compos* at such a period." 2 Madd. 578.

From these citations the following conclusions are deducible:

1. An inquisition of lunacy is not conclusive against any person not a party to it.

2. When an inquisition is admitted in evidence, the party against whom it is used may introduce proof that the alleged lunatic was of sound mind at any period of the time covered by the inquisition. This position is, indeed, a corollary from the former, as it would be inconsistent to say the inquisition was not conclusive and at the same time to refuse to receive any evidence to contradict the fact stated in it.

3. The party against whom the inquisition is received may impugn the finding by contrary evidence, without first pursuing the procedure technically called a traverse of the inquisition.

If such be the rule in the English courts, we may with propriety recognize it here, as we have not enacted among our laws the provision contained in the statute: 2 Ed. VI., c. 8, sec. 6, on which, according to some writers, the proceeding by traverse in England depends at least as a matter of right.

The counsel of the defendant, in his brief, referred us to 1 Ph. on Ev. 299, for the purpose of showing that an inquisition of *felo de se* which carries with it a forfeiture of estate, is conclusive until traversed in the court of king's bench. But against whom? The author says Lord Coke considered it conclusive evidence of the fact against the executors or administrators of the deceased; that Lord Hale was of a contrary opinion, and that it is now settled that such an inquisition may be removed into the king's bench, and traversed by the executors or administrators of the deceased. Nothing is said, however, as to the effect of the inquisition against third persons. In page 301, Phillips speaks of the inquisition of lunacy. He says it is evidence against third persons who were strangers to the proceedings. He does not directly say whether conclusive or *prima facie*, though his meaning can not readily be misunderstood; but to support his position he cites the case already mentioned, of *Sergeson v. Seale*, in which Lord Hardwicke says it may be read, but it is not conclusive. In *Ex parte Roberts*, 3 Atk. 5, in matter of lunacy, another case referred to in the defendant's brief, the chancellor said: "The question, therefore, is whether I shall grant leave for the lunatic to traverse or not. Upon reasonable terms I am willing to put it in some method of inquiry, and it will be for the advantage of all parties; for if I grant the custody, the committees must bring a bill to set aside the settlement which he made of his estate, and Doctor Finney would have a just right to insist on the validity of it, so that an issue must be directed to try it, and such an issue would be a greater expense to the parties than a traverse, and, therefore, I asked whether Doctor Finney would submit to be bound by the traverse; for though it would be binding against Mr. Roberts, it would not be so against Doctor Finney, as to the grant of the custody of the land, who claims as a purchaser."

From these remarks it is clear the chancellor held a different opinion from the proposition insisted on in the defendant's brief; that the inquisition is conclusive until traversed in chancery and set aside; for he says Finney, who claimed as the purchaser of the alleged lunatic's estate, would have a just right to insist on the validity of the conveyance to him, notwithstanding the in-

quisition, and that even if upon a traverse the inquisition had been confirmed he would not have been bound unless he had submitted to be bound by the traverse.

The disastrous consequences of the retroactive operation of an inquisition, if conclusive, strongly recommend the wisdom and policy of withholding from it such influence. In its nature it is *ex parte*. It would be inconsistent with the common and uniform principles of jurisprudence to suffer an act of such a nature to sweep away with irresistible force all contracts executed under whatever circumstances of solemnity, and even to abrogate the contract of marriage, at the expense of the undefended and truly unfortunate offspring.

Such is the diversity of judgment respecting the state of the mind, that on this, more than perhaps any other question, error may be anticipated from uncontroverted proofs and *ex parte* examinations. Joliffe would have been found of insane mind if the witnesses to his will and his dozen servants had alone testified: *Lowe v. Joliffe*, 1 Wm. Bl. 365. The will of John Sinickson, instead of being sanctioned by the verdict of a jury, would have been condemned had the question of his capacity depended on the witnesses of one of the parties: *Harrison v. Rowan*, 3 Wash. 580. The mental capacity of Benjamin Vancleve was proved to the satisfaction of two juries, one in this court, and one in the circuit court of the United States, yet was denied by a number of respectable witnesses: 2 South. 589.

The first question proposed to us should, in my opinion, be answered in the negative, the second in the affirmative, and judgment should be entered for the plaintiff on the verdict.

FORD, J., concurred. DRAKE, J., gave no opinion, having been of counsel for one of the parties.

Judgment for the plaintiff.

The principal case is in harmony with the authorities upon the admissibility and effect of inquisitions as evidence against third persons. Thus, Mr. Greenleaf, in section 556 of volume one of his work on evidence, says: "The last subject of inquiry under this head is that of inquisitions. These are the results of inquiries, made under competent public authority, to ascertain matters of public interest and concern. It is said that they are analogous to proceedings *in rem*, being made on behalf of the public; and that, therefore, no one can strictly be said to be a stranger to them. But the principle of their admissibility in evidence, between private persons, seems to be that they are matters of public and general interest, and, therefore, within some of the exceptions to the rule in regard to hearsay evidence which we have heretofore considered. Whether, therefore, the adjudication be founded on oath or not, the principle of its admissibility is the same. And, moreover, it is distinguished from other hearsay evidence in having peculiar guarantees

for its accuracy and fidelity. The general rule in regard to these documents is that they are admissible in evidence, but that they are not conclusive except against the parties immediately concerned, and their privies. Thus, an inquest of office, by the attorney-general, for lands escheating to the government, by reason of alienage, was held to be evidence of title in all cases, but not conclusive against any person who was not tenant at the time of the inquest, or party or privy thereto, and that such persons, therefore, might show that there were lawful heirs *in esse* who were not aliens. So it has been repeatedly held that inquisitions of lunacy may be read, but that they are not generally conclusive against persons not actually parties. But inquisitions extrajudicially taken are not admissible in evidence," citing *Stokes v. Dawes*, 4 Mason, 268; *Sergeson v. Sealey*, 2 Atk. 412; *Den v. Clark*, 5 Halsted, 217; *Hart v. Deamer*, 6 Wend. 497; *Faulder v. Silk*, 3 Campb. 126; 2 Madd. Chan. 578. But in section 550 of the same volume the author states that "where a court of probate has power to grant letters of guardianship of a lunatic, the grant is conclusive of his insanity at that time, and of his liability, therefore, to be put under guardianship against all persons subsequently dealing directly with the lunatic, instead of dealing, as they ought to do, with the guardian."

CASES
IN THE
SUPREME COURT
OF
NEW YORK.

STORY v. ELLIOT.

[8 COWEN, 27.]

SUNDAY IS DIES NON JURIDICUS by a canon of the church incorporated into the common law, and judicial acts can not be done on that day, though other acts may be, unless prohibited by statute.

MAKING AN AWARD IS A JUDICIAL ACT, and if done on Sunday is void.

DEBT on bond for the performance of an award. It appeared that the award was made and published on Sunday, on which ground the defendant objected to it as a nullity. Verdict for the plaintiff at the circuit, subject to the opinion of this court.

C. P. Kirkland, for the plaintiff.

A. Hackley, contra.

By Court, SAVAGE, C. J. The first section of our statute for suppressing immorality (2 R. L. 193) enacts, that there shall be no traveling, servile labor, or working, shooting, etc., on the first day of the week, commonly called Sunday. The fifth section enacts, that no person upon the first day of the week, commonly called Sunday, shall serve or execute, or cause to be served or executed, any writ, process, warrant, order, judgment, or decree, except in cases of treason, felony, or breach of the peace; but that the service shall be void.

Under this act it has been decided that process can not be issued on Sunday, and that process issued and put into the hands of an officer is not a commencement of the suit on that day: 12 Johns. 178. That a writ of inquiry can not be executed on Sunday: 15 Johns. 179; though a verdict of a jury

may be received on that day: 15 Johns. 119 and 179. And carrying the spirit of the statute into the practice of the courts, it has been decided that a notice can not be served on Sunday: 20 Johns. 140.

Sunday is stated in all the books to be *dies non juridicus*; not made so by the statute, but by a canon of the church, incorporated into the common law. According to the history given by Lord Mansfield, in the case of *Swan v. Broome*, 3 Burr. 1597; 2 Bl. 526, S. C.,¹ anciently the courts of justice did sit on Sunday. It appears by Sir Henry Spelman's original of the term, that the "Christians at the first used all days alike for the hearing of causes, not sparing, as it seemeth, the Sunday itself." They had two reasons for it; one was in opposition to the heathens, who were superstitious about the observation of days and times, conceiving some to be ominous and unlucky, and others to be lucky; and, therefore, Christians laid aside all observance of days. A second reason they had was that by keeping their own courts always open, they prevented the Christian suitors from resorting to the heathen courts. But in the year 517 a canon was made: "*Quod nullus episcopus vel infra presens usi summorum causas judicare præsumat*," and this canon was ratified in the time of Theodosius, who fortified it with an imperial constitution: "*Solis die (quem dominicum recte dixere majores) omnium omnino litium et negotiorum quiescat intentio*." Other canons were made in which vacations were appointed. These and other canons and constitutions were received and adopted by the Saxon kings of England. They were all confirmed by William the Conqueror and Henry the Second; and so became part of the common law of England.

Various decisions have been made in the English courts as to what may or may not be done on Sunday. In the 20 Jac. 1, an information appeared by the record to have been exhibited in court on Sunday, which the court held good under a particular law; but it was at the same time held that Sunday was not *dies juridicus* for awarding judicial process, nor for entering any judgment of record. Writs were formed returnable on Sunday when the courts might sit on that day; and the forms remain, though no business can be done till Monday. In *Mackalley's case*, 9 Co. 66; Cro. Jac. 279; S. C., in the 9 Jac. 1, it was resolved that no judicial act ought to be done on the Sabbath, but ministerial acts may be lawfully executed on that day. In *Comyns v. Boyer*, Cro. Eliz. 405, it was said that a fair holden

1. S. C., 1 Wm. Bl. 526.

upon Sunday is well enough; although by statute 27 H. VI., c. 5, there is a penalty inflicted upon the party that sells upon that day; but it makes it not to be void. This doctrine is denied in *Drury v. Defontaine*, 1 Taunt. 135, where the court say, the law is since changed; and if any act is forbidden under a penalty, a contract to do it is now held void. In this case, it was held that the sale of a horse on Sunday was valid; not being contrary to the common law, nor prohibited by the statute 29, c. 2, which enacts that "no person, whatsoever, shall do or exercise any worldly labor, business, or work of their ordinary callings upon the Lord's day;" and the sale of the horse not being the ordinary calling of the plaintiff, the contract was held valid: *Prinsor's case*, Cro. Car. 602, was before the statute 29, Car. 2. In that case Prinsor, an officer, was punished for arresting one Hazlewood, as he came from divine service; because he might have arrested him any day of the week. This shows that the court thought it highly improper to serve process on that day, unless from necessity, though such arrests were then not prohibited by statute.

Since the 29 Car. II., there are many decisions in the English books, in which the service of process, and other acts in the course of judicial proceedings, are held unlawful and void by virtue of that statute.

By the common law, then, it appears all judicial proceedings are prohibited. All other acts are lawful unless prohibited by statute. Our statute enumerates traveling, servile labor, and working, together with various pastimes; but leaves many acts lawful, which are notwithstanding highly offensive to religion and morality. The making a promissory note has been held unlawful in Connecticut: 1 Root, 474; but in Massachusetts it is lawful: 10 Mass. 312. If a note fall due on Sunday in Connecticut it must be paid on Monday; in this state on Saturday; but in neither on Sunday.

The making of an award can not be included in the terms, "traveling, servile labor, or working;" and is, therefore, not prohibited by statute. But, in my judgment, it is a judicial proceeding. It is clearly within the terms "*litium et negotiorum*," mentioned in the constitution of Theodosius.

But we have authority at home to this point. In *Barlow v. Todd*, 3 Johns. 368, it is said the arbitrators are judges, chosen by the parties themselves, and their awards are not examinable in a court of law, unless the condition is to be made a rule of court, and then only for corruption or gross partiality.

In *Van Cortlandt v. Underhill*, 15 Johns. 416,¹ Yates, justice, speaking of awards, says: "It certainly would be a dangerous innovation to place them on a footing with the verdict of a jury. They are and ought to be of a more binding force between the parties. It (an award) is a decision of a tribunal of the parties' own choice and election." This doctrine is fully supported by English adjudications. Arbitrators are not only jurors to determine facts, but judges to adjudicate as to the law; and their award, when fairly and legally made, is a judgment conclusive between the parties, from which there is no appeal.

I am, therefore, of opinion that the award of the arbitrators was void; being made and published on Sunday. As the case is subject to the opinion of the court, the defendant is entitled to judgment.

Judgment for the defendant.

VALIDITY OF ACTS DONE ON SUNDAY.—The law respecting the validity of judicial acts done on Sunday, as well as of contracts made on that day, is discussed at length in the note to *Coleman v. Henderson*, 12 Am. Dec. 290. The doctrine above laid down, that Sunday is *dies non juridicus* by the common law; and, therefore, that judicial acts performed on that day are void, is recognized in *People v. Luther*, 1 Wend. 42; *Masson v. Annas*, 1 Denio, 206; *Pulling v. People*, 8 Barb. 385; *Merritt v. Earle*, 31 Id. 41; but acts not judicial performed on Sunday are valid, unless prohibited by statute: *Boynton v. Page*, 13 Wend. 430; *First Baptist Church v. Utica, etc., R. R. Co.*, 6 Barb. 319; *Batesford v. Every*, 44 Id. 621; all citing the principal case. Its authority is recognized, also, on the point as to what acts and contracts come within the prohibition of the statute, in *Campbell v. International Life Ass. Soc.*, 4 Bos. 317; and *Smith v. Wilcox*, 24 N. Y. 356; and, generally, as to the validity of Sunday laws, in *Lindenmuller v. People*, 21 How. Pr. 169; S. C. 33 Barb. 572; and *Ex parte Andrews*, 18 Cal. 681.

AWARD SIGNED BUT NOT PUBLISHED ON SUNDAY.—In *Isaacs v. Beth Hamedash Society*, 1 Hilt. 469, it was held that where all the arbitrators, parties, and witnesses in a cause were of the Jewish persuasion, and the trial before the arbitrators was held on Sunday, and their award was drawn up and signed on that day, but was dated and delivered to the parties on the following day, such award was valid, and that the doctrine of *Story v. Elliot* extended only to the prohibition of the publication of the award on Sunday. Daly, J., in delivering the opinion of the court, after remarking that the award having been dated and delivered on Monday, it must be regarded as having been made and published on that day, since the arbitrators might, before that time, have changed it if they saw fit, referred to *Story v. Elliot*, as follows: "The case of *Story v. Elliot* would have been in point, if the arbitrators had published it on Sunday. In that case the publication of an award was regarded as equivalent to the giving of judgment, which can not be done on Sunday; but I find no case that would warrant us in concluding that the award is vitiated and made void, by what was done by the arbitrators on the Sunday preceding its publication. As before remarked it was [not] un-

1. *Van Cortlandt v. Underhill*, 17 Johns. 416.

lawful for the arbitrators, being of the Jewish persuasion, to do what they did on that day, in the investigation of the matter, and if their sitting and investigating it, preparatory to publishing their award, might be regarded as partaking of the nature of a judicial proceeding, which I very much doubt, still it would not render their subsequent award void. Sunday is not *dies juridicus* for the giving of judgment, or the awarding of judicial process, but it may be for other matters connected with judicial proceedings: 3 Thomas' Coke, 355, n. 3."

VERDICT RETURNED ON SUNDAY.—Where a jury are unable to agree until Sunday morning, it is a work of necessity to receive their verdict on that day: *Van Riper v. Van Riper*, 7 Am. Dec. 576.

LEWIS v. PAYN.

[8 COWEN, 71.]

ALTERATION OF A LEASE FOR YEARS, even in an immaterial part, by one claiming a benefit under it, destroys his right of action on it.

CANCELLATION OR LOSS OF A DEED DOES NOT DIVEST TITLE vested under it.

WHEN AN ESTATE CAN NOT HAVE EXISTENCE BUT BY DEED, the fraudulent destruction of the deed, by the holder of the estate, destroys his remedy thereon as well as his estate.

AN ESTATE WHICH MAY EXIST WITHOUT DEED is not destroyed by the fraudulent cancellation and destruction of the deed conveying it, by the holder thereof, but his right of action on covenants contained therein is gone.

RENT CHARGE EXISTS ONLY BY DEED, and, therefore, both deed and estate are destroyed by a fraudulent alteration of the deed.

WHERE A LEASE IS EXECUTED IN DUPLICATE, each party receiving one, both are originals; the fraudulent alteration of one of them, by the party holding it, does not destroy his estate under it, if the other remains intact.

ALTERATION IN A BOND BY THE OBLIGEE, in a point not material, avoids it.

REPLEVIN. The defendant avowed the taking for a half-year's rent in arrear on a lease of certain land. Pleas, non-tenancy, and *riens in arriere*. At the trial below, the defendant gave in evidence the lease in question containing a reservation in his favor of "all rents now due, or that may hereafter become due" by reason of certain leases previously executed to certain parties named therein. The plaintiffs claimed that the words "or that may hereafter become due" had been fraudulently interpolated by the defendant, and there was much contradictory evidence on that point. The plaintiffs introduced a counterpart of the lease executed by both parties simultaneously with the original. The judge instructed the jury that the lease was void and the plaintiffs entitled to a verdict, if the words in question were forged,

though in fact not material to the rents in dispute. Verdict for the plaintiffs. Motion for a new trial on grounds which appear from the opinion.

S. G. Huntington, for the motion.

J. L'Amoureux, contra.

By Court, SAVAGE, C. J. The defendant alleges that the verdict is against evidence. The evidence is certainly contradictory, and as it is the province of the jury to weigh the testimony, I should feel unwilling to disturb the verdict on the question of alteration. The jury would have been justified in finding either way. The evidence as to the character of the defendant was improper, but was not objected to, and some of the questions were put by the defendant's own counsel.

The only point for the present discussion is the correctness of the judge's charge. This must be understood in reference to the facts of the case. The lease was proved and admitted to be in the handwriting of the defendant. If, therefore, any alteration was made, it must have been made by the defendant himself, and not by a stranger. Had the judge said that if the lease (supposing it to be for a term of years and therefore a chattel) had been altered by Payn, though in a part not material, yet it would thereby become void and inoperative as respects Payn's right to recover upon it, no fault could possibly have been found with the charge. The law was thus laid down in *Pigot's case*, 11 Co. 27. This was an action on a bond. It was there resolved "that when any deed is altered in a point material, by the plaintiff himself, or by any stranger, without the privity of the obligee, be it by interlineation, addition, raising, or by drawing of a pen through a line, or through the midst of any material word, the deed thereby becomes void." "So, if the obligee alters the deed by any one of the said ways, although it is in words not material, yet the deed is void; but if a stranger, without his privity, alters the deed by any of the said ways, in any point not material, it shall not avoid the deed." So in *Shepherd's Touchstone*, 69: "If the alteration be made by the party himself that owneth the deed, albeit it be in a place not material, and that it tend to the advantage of the other party and his own disadvantage, yet the deed is thereby become void." This doctrine is referred to and adopted in numerous authorities: 4 Com. Dig. by Day, 294; 15 Johns. 297. The ancient doctrine on this subject is supposed by plaintiff's counsel to have undergone some modification in

modern times. Platt, justice, in *Jackson ex dem. Malin v. Malin*, 15 Johns. 297, expresses a doubt whether the act of a stranger should prejudice a party, though the alteration be in a part material; and in *Rees v. Overbaugh*, 6 Cowen, 746, we held that it should not. Yet no doubt is anywhere expressed that a deed is rendered void by an alteration in favor of the party making it.

In *Hatch v. Hatch*, 9 Mass. 311 [6 Am. Dec. 67], Sewall, justice, says these rules have not the same operation where a title to real estate is in question. The canceling of a deed will not divest property which has once vested by a transmutation of possession. A man's title to his estate is not destroyed by the destruction of his deed. The case of *Bolton v. Bishop of Carlisle*, 2 H. Bl. 250,¹ was brought to recover an incorporeal hereditament, a presentation to a vicarage, and it was there held that a right once vested is not divested by merely canceling the deed, or by a loss of the title. In that case the deed was said to be canceled by the seal of the grantor being taken off and destroyed or lost, but by whom it is not said.

This doctrine was adopted in *Jackson v. Chase*, 2 Johns. 86, 87; and several ancient authorities say a rent or other subject of grant is not lost by the destruction of the deed, as a bond or chose in action is: Viner's Abr., Faits, X, 2 pl. 5, citing Ventris, 297; and 2 Lev. 113, with a query by Ventris, if the party himself cancels it: 1 Salk. 120. In *Read v. Brookman*, 3 T. R. 151, the question was like that in *Bolton v. Bishop of Carlisle*, whether a deed could be well pleaded, being canceled or lost by time and accident. It was there held that when the plaintiff declares on a lost deed, the proper course is to describe it as lost, and then no proof is necessary. The court proceed upon the doctrine, which can not be contested, that the loss of a deed does not deprive the party of a remedy upon it. In *Dyer*, 162, a., it was held that an indenture, being a lease for years, had lost its efficacy, certain words not material being erased by the lessee. In *Muller v. Manwaring*, Cro. Jac. 399,² the case was, a lease had been given to Rochester for thirty years, and a material erasure had been made in it. Two justices held that the deed was void, but the lease remained, and they took a difference where an estate loseth its essence by a deed, viz., when it may not have an essence without a deed, as a lease by a corporation, or of tithes, or grant of a rent charge; if the deed be rased after delivery, it determines the estate and makes it void. But when the estate may have essence without a deed,

1. 2 H. Bl. 259.

2. Cro. Charles, 397.

there, though the estate is actually created by deed, which is afterwards rased by the party himself, or a stranger, that shall not destroy the estate, although it destroys the deed. Wherefore they concluded in that case that the rasure did not avoid the lease. Croke argued that as the lease only existed by the deed, it was a contract by deed, and the party in interest under that deed rasing it, he had destroyed the deed and thereby terminated his interest under it. Then, as the lessee made the rasure, he thought it was at the election of the lessor whether the lease should be in force. In 1 Nels. Abr. 625, this doctrine is thus laid down: where an estate can not have its essence without a deed, there, if the deed is rased in a material part after the delivery, it makes the estate void; but if the estate may have an essence without a deed, there the rasure should not destroy the estate, but the deed.

In the note, 136, to Co. Lit. 225, b, it is said that the canceling of the deed does not divest the estate from the person in whom it is vested by the deed: Citing 1 Rep. in Ch. 100; Gilb. 236. In the case of *Bollon v. Bishop of Carlisle*, the court held that the canceling of a deed did not divest property which has vested by transmutation of possession, and that the law is the same with things that lie in grant. The case before them was of an advowson. The action was a *quare impedit* to recover the presentation to a vicarage, an incorporeal hereditament; but that case supposes the deed lost, not fraudulently altered by a party to be benefited by the alteration. The doctrine in Cro. Car. & Nels. Abr. seems to be sound, that where an estate can not have existence but by deed, and the deed creating the estate is fraudulently destroyed by the party possessing the estate, the deed is void as to any remedy in favor of the fraudulent party; and the estate which he derived under it is gone. But where an estate which may exist without deed (for instance, a fee-simple estate in lands) is conveyed by deed, then the fraudulent alteration or canceling the deed destroys the deed, but not the estate. If the deed be a quitclaim, the party loses nothing; if it contain covenants, he loses all right to an action on these; but the title is not divested. A rent charge can be created in no other manner than by deed; and the fraudulent alteration destroys both the deed and the estate.

In this case, however, there are two leases, one for each party, both alike, and both are properly originals, as they are each executed by both parties, so that there was sufficient evidence to have authorized a recovery by the defendant without

the production of the deed in his possession, unless his estate is gone in consequence of the alteration made by him in the copy of the lease, which was in his possession. Had there been but one lease, and that had been altered by Payn, as the copy in his possession was, all the estate which he takes by it would be forfeited and gone. The alteration avoids that deed so far as he derives a benefit under it. But the estate is not destroyed, as there is still a valid deed in possession of Lewis, which secures to him the estate granted.

I am, on the whole, of opinion that although Payn altered the lease in his possession, yet the estate created by it, and by the lease in Lewis' possession having vested in him, and being still supported by the lease in possession of Lewis, was not divested by the fraudulent alteration of the deed. Had Payn altered both, then he would have lost his estate. The rule laid down to the jury is law as applicable to bonds; but the distinctions now taken were not adverted to.

New trial granted.

ALTERATION OF INSTRUMENTS, EFFECT OF.—This subject is considered, and many cases collected in the note to *Woodworth v. Bank of America*, 10 Am. Dec. 267. So, also, on the same point, *Stephens v. Graham*, 10 Id. 486; *Dea v. Wright*, 11 Id. 546; *Campbell v. McArthur*, Id. 737; and *Aubuchon v. McKnight*, 13 Id. 502, and note. As to the effect of an alteration in a memorandum indorsed on, or annexed to, a note or bill, see the note to *Tuckerman v. Hartwell*, 14 Am. Dec. 225. The doctrine of the principal case that a fraudulent alteration of a deed by the grantee does not divest title which has become vested under it, is approved in *Jackson v. Jacoby*, 9 Cow. 126; *Jackson v. Gould*, 7 Wend. 366; *Smith v. McGowan*, 3 Barb. 407; *Chappell v. Spencer*, 23 Id. 586. Particularly an alteration in an immaterial part: *Herrick v. Malin*, 22 Wend. 393. So, as to the cancellation of the deed: *Suydam v. Beale*, 4 McLean, 14. But such an alteration by a party to an instrument vitiates it as against him with respect to all benefits, remedies, and rights of action which depend upon the instrument itself: *Tillon v. Clinton and Essex Mut. Ins. Co.*, 7 Barb. 567; *Northern Railroad Co. v. Miller*, 9 Id. 278; *Moir v. Brown*, 14 Id. 48; *Waring v. Smyth*, 2 Barb. Ch. 127; per Ruggles, Vice-chancellor, all citing *Lewis v. Payn*, as an authority on this point. In *Little v. Herndon*, 10 Wall. 31, also, it is referred to as authority for the position that an erasure, or other alteration found in a deed, will, in the absence of proof to the contrary, be presumed to have been made before the deed was executed.

Upon a second trial of the principal case, in accordance with the foregoing decision, the question as to whether or not there had been a fraudulent alteration of the lease in question was again submitted to the jury, who found against the defendant, and the supreme court refused to disturb the verdict: *Lewis v. Payn*, 4 Wend. 423.

CUNNINGHAM v. BUCKLIN.

[8 COWEN, 178.]

SUFFICIENCY OF AVERMENT ON GENERAL DEMURRER.—In a declaration against a defendant for corrupt misconduct as a commissioner under the insolvent act in discharging the plaintiff's debtor, whereby the debt was lost, an averment that after judgment the debtor could not be found to satisfy the plaintiff is sufficient on general demurrer, without alleging that a *ca. sa.* was issued and returned *non est inventus*.

JUDGE OF A COURT OF RECORD IS NOT LIABLE in a civil action, even for corrupt misconduct in office.

JUDICIAL LIABILITY, CASES CONCERNING, reviewed by Savage, C. J.

COMMISSIONER IS NOT A JUDGE OF RECORD, who is specially authorized by statute to perform certain duties of a judge of the supreme court in granting discharges to insolvents, though he acts judicially within his jurisdiction.

MALICIOUS AND CORRUPT CONDUCT IN OFFICE can not be alleged or proved against one acting under a special and limited jurisdiction, in contradiction to his own record, which is made by statute conclusive evidence.

COMMISSIONER IN INSOLVENCY IS NOT CIVILLY LIABLE for alleged corrupt and malicious misconduct in granting a discharge to an insolvent where he has jurisdiction, and where the discharge being made by statute, conclusive evidence of the facts therein shows on its face that all the proceedings were regular and correct; as, where it is alleged that the discharge was granted without notice to creditors, "deceitfully, corruptly," etc., "under color and pretense" that an adjournment had been had from a prior hearing, when there was no such adjournment, but the discharge states that there was a regular adjournment.

DISCHARGE CAN NOT BE CONTRADICTED in pleading, if the statute makes it conclusive as evidence.

ACTION against the defendant for alleged corruption and misconduct as a commissioner under the insolvent act in granting a discharge to one Shepherd, the plaintiff's debtor, whereby the plaintiff lost his debt. The declaration alleged in substance that the plaintiff, being a creditor of Shepherd, brought an action against him in which the said Shepherd put in special bail; that while the action was pending, Shepherd filed a petition praying the defendant Bucklin, as commissioner under the insolvent act, to grant him his discharge; that the defendant made an order for Shepherd's creditors to show cause against his discharge on December 9, 1824; that the plaintiff appeared on that day, but that Shepherd did not, nor did any one on his behalf; that the defendant adjourning to December 11, 1824, when the plaintiff again appeared, but there was no appearance for Shepherd, who had removed from the state; that on that day the defendant dismissed further proceedings in the matter; that the

plaintiff on June 20, 1825, obtained a verdict in his action against Shepherd for a certain sum; that on July 2, 1825, Shepherd returned to the state, and the defendant Bucklin, corruptly colluding and conspiring with him to prevent the plaintiff from availing himself of his verdict, without any notice to Shepherd's creditors, and without any adjournment of the former hearing, corruptly, fraudulently, collusively, and maliciously, and under color and pretense that the hearing had been adjourned to July 2d, discharged Shepherd, setting forth the discharge *verbatim*, wherein it was expressly recited that such adjournment had been had; that such recital was false; that on July 5th, Shepherd again left the state; that judgment was afterwards entered on the plaintiff's verdict, but no property could be found, and that Shepherd's body had not been surrendered and could not be found; and that the bail were afterwards released on the ground of the insolvent discharge, and the plaintiff lost his debt, etc. To this declaration, the defendant filed a plea, the substance of which is stated in the opinion. Demurrer to the plea, on the ground that it was no answer to the declaration; that it did not deny or confess and avoid the facts stated; that the allegations of fraud and collusion were not denied; that the plea simply reiterated the facts stated, and averred that the discharge had not been reversed or vacated. Joinder in demurrer.

C. E. Clarke and J. Platt, for the demurrer.

Talcott, attorney-general, contra.

By Court, SAVAGE, C. J. The principal question argued, though I think not necessarily involved in the demurrer, is, whether a judge of a court of record is responsible for a corrupt exercise of his office.

The question upon the record is, whether malicious and corrupt conduct in his office can be alleged and proved against a person acting under a special and limited jurisdiction, in contradiction to his own record, which is declared by statute to be conclusive evidence.

The declaration expressly charges that the defendant acted corruptly and maliciously, and without jurisdiction, in granting Shepherd's discharge. The plea sets forth the insolvency and petition upon which the proceedings were founded, and then avers that such proceedings were had that Shepherd was discharged; but does not traverse the facts specially alleged, that he acted without jurisdiction, and corruptly and maliciously. The

plea is certainly not a full answer to the declaration, and would seem, therefore, to be bad in an ordinary case of pleading.

But it was contended that the declaration is bad in substance, inasmuch as it shows no damage; that it contains no averment of the issuing of a *ca. sa.* against Shepherd, and *non constat* but that he might have paid the plaintiff's demand, if charged in execution. The averment is, that he could not be found to satisfy the plaintiff. This is sufficient upon general demurrer. Had the defendant demurred specially to the declaration, it might have been held otherwise. Whether it would, we need not now decide. The charge in the declaration is substantially stated, that by means of the defendant's irregular and unlawful and corrupt conduct as a commissioner, under the act of 1819, the body of Shepherd was discharged from imprisonment, in consequence of which the plaintiff lost his debt; for the purposes of the present discussion, these facts must be considered as admitted; they are admitted on the record by the pleadings.

The general question, then, is, whether the facts alleged can avail the plaintiff in the present suit. In deciding this question, it will be found on inquiry, that the law of judicial irresponsibility is, as I before remarked, out of the case.

"The doctrine which holds a judge exempt from a civil suit or indictment, for any act done or omitted to be done by him sitting as judge," says Kent, C. J., 5 Johns. 291, "has a deep root in the common law." In the case of *Yates v. Lansing*, 5 Johns. 282, and 9 Id. 395 [6 Am. Dec. 290], the question of judicial inviolability was fully discussed, both by the counsel and by the court; but the question in that case was whether the chancellor had acted without jurisdiction in imprisoning the plaintiff, and was, therefore, personally liable; not whether the chancellor or a judge would be liable civilly for corrupt conduct in his office. Many of the English cases cited assert the total exemption of judges of record from responsibility or accountability in any way, except to the king by whom they were appointed, and in whose name and stead they administer justice. Hawkins says, book 2, c. 72, sec. 6: "And as the law has exempted jurors from the danger of incurring any punishment in respect of their verdict in criminal cases, it hath also freed the judges of all courts of record from all prosecutions whatsoever, except in the parliament, for anything done by them openly in such courts as judges. For the authority of a government can not be maintained, unless the greatest credit be given to those who are so highly intrusted with the administration of public justice, and

it would be impossible for them to keep up in the people that veneration of their persons, and submission to their judgments, without which it is impossible to execute the laws with vigor and success, if they should be continually exposed to the prosecutions of those whose partiality to their own causes would induce them to think themselves injured. Yet, if a judge will so far forget the dignity and honor of his post, as to turn solicitor in a cause which he is to judge, and privately and extrajudicially tamper with witnesses or labor jurors, he hath no reason to complain if he be dealt with according to the same capacity to which he so basely degrades himself." Hawkins is here treating of conspiracy; and by the latter sentence, no doubt, intends to say, that judges who so conduct are liable to a prosecution for conspiracy. That is the subject treated of in this chapter. In 12 Co. 25, is stated the case of one Nudigate, who was a justice of the peace, and had recorded a force upon view, which he did as judge upon record, and a bill was exhibited against him for this; that he had falsely made a record, when, indeed, there was not any force, and by the opinions of Catlin and Dyer, chief justices, it was resolved, "that that thing that a judge doth as judge of record ought not to be drawn in question." Holt, C. J., says: "A judge is not answerable, either to the king or the party, for the mistakes or errors of his judgment in a matter of which he has jurisdiction; it would expose the justice of the nation, and no man would execute the office upon peril of being arraigned by action or indictment for every judgment he pronounces:" *Groenvell v. Burwell*, 1 Salk. 396.¹ In another report of the same case, 12 Mod. 389, his language is stated rather more strongly: "Then, if the censors in this case are judges of record, the consequence is very strong that no act of theirs, which they do as judges, is traversable, and no averment receivable that a judge of record has acted against his duty. A judge of oyer and terminer was indicted; for that, he being a judge, and one being indicted before him for trespass, he made up the record to be for felony, and adjudged the indictment did not lie, and it was quashed; and that it should never be averred but that it was for felony, nor could a judge be supposed guilty of such an offense." The case of *Hamond v. Howell*, recorder of London, 2 Mod. 218, had been previously decided, containing the doctrine that no action lies. In *Miller v. Seare*, 2 Bl. 1141,² De Grey, Chief Justice, says: "It is

1. *Groenvell v. The College of Physicians*, 12 Mod. 389.

2. 2 W. Bl. 1141.

agreed that the judges in the king's superior courts of justice are not liable to answer personally for their errors in judgment. In courts of special and limited jurisdiction, having power to hear and determine, a distinction must be made. While acting within the line of their authority, they are protected as to errors in judgment; otherwise they are not protected." Lord Mansfield says, Cowp. 172: "If an action be brought against a judge of record, for an action done by him in his judicial capacity, he may plead that he did it as judge of record, and that will be a complete justification."

In the case of *Yates v. Lansing*, 5 Johns. 282 [6 Am. Dec. 290], these cases and many more are ably reviewed by Kent, C. J., and he concludes an eloquent opinion by saying, that "whenever we subject the established courts of the land to the degradation of private prosecution, we subdue their independence, and destroy their authority. Instead of being venerable before the public, they become contemptible; and we thereby embolden the licentious to trample upon everything sacred in society, and to overturn those institutions which have hitherto been deemed the best guardians of civil liberty." When the same case was decided in the court for the correction of errors, the prevailing opinion was delivered by Mr. Senator Platt, who concurred generally in the views expressed by the justice, and relied principally upon the same authorities. The argument on the other side admitted the inviolability of judges, whether superior or inferior, so long as they acted within their jurisdiction. There are other cases in this court recognizing the general doctrine. In *McDowell v. Van Deusen*, 12 Johns. 356, the court lay down this proposition: "It is a general principle that a judge can not be excepted to or challenged for corruption; but must be punished by indictment or impeachment." They cite 1 Inst. 294, and 2 Id. 422.

In the case now under consideration, it can not be successfully contended that the defendant is a judge of record. He is a commissioner; not clothed with any general judicial authority; not vested with power to fine and imprison; but specially authorized to do certain acts under certain circumstances. Within his jurisdiction, he acts judicially. He is a commissioner to perform certain duties of a judge of the supreme court; but judges of the supreme court, as such, have no authority to discharge insolvent debtors. That power is conferred upon them severally, by the same statute which gives a similar authority to commissioners. When judges act under the insolvent law, they

act, not as judges, but as commissioners, clothed with the same powers, and subject to the same liabilities, as all other commissioners. In some things they act judicially; and while they so act, are not responsible for any error of judgment, if they are for willful misconduct. On this point there are some decisions, both in the English courts and in our own. *Ashby v. White*, 2 Ld. Raym. 938, is a leading case in the class of actions brought against persons clothed with a special authority. The ultimate determination in that case was, that a person entitled to vote at an election for members of parliament, might prosecute for an obstruction of that right; and, for anything to be collected from the opinion of Chief Justice Holt, the motives of the defendant were not considered material, though from the declaration it appears that the refusal of the plaintiff's vote is charged to have been done *malitiose*. In *Drewe v. Coullon*, 1 East, 563, note a, before Wilson, J., the action was for refusing the plaintiff's vote. Wilson, J., said: "This is, in the nature of it, an action for misbehavior by a public officer in his duty. Now, I think it can not be called a misbehavior, unless maliciously and willfully done, and that the action will not lie for a mistake in law;" "and by willful, I understand contrary to a man's own conviction." And he held the want of malice a full defense. In *Jenkins v. Waldron*, 11 Johns. 114 [6 Am. Dec. 359], this court recognized the same principle, and applied it to a similar case. They held that no action lay against the inspectors of a popular election, for refusing the plaintiff's vote without malice. Spencer, J., in delivering the opinion of the court, says: "It would, in our opinion, be opposed to all the principles of law, justice, and sound policy, to hold that officers called upon to exercise their deliberative judgments, are answerable for a mistake in law, either civilly or criminally, when their motives are pure and untainted with fraud or malice."

In the case of *Mather v. Hood*, 8 Johns. 50, this court held, that a justice was justified, while acting within his jurisdiction, under the statute, to prevent forcible entries and detainers. They say the decisions are uniform that the record is not traversable, because the justice, in making it, acts not as a minister, but as a judge; and according to settled principles of law, a record of such proceedings, which is regular and correct upon the face of it, can not be questioned or traversed in a collateral action. It is a full and complete bar to any suit against the magistrate.

The case of *Bigelow v. Stearns*, 19 Johns. 39 [10 Am. Dec.

189], was an action against the justice of the peace, for false imprisonment. The plaintiff had been committed to jail upon conviction before the defendant as a magistrate, of an offense against the act for suppressing immorality. The defendant justified by producing the record of conviction of the plaintiff, who then offered to show that he was not brought into court before the justice previous to conviction. This was objected to, but admitted. Spencer, C. J., who delivered the opinion of the court, held that the conviction was a complete justification to the defendant as to anything set forth in it, unless he had exceeded his jurisdiction, or had not jurisdiction of the person of the plaintiff. He says: "If a court of limited jurisdiction issues process which is illegal, and not merely erroneous; or if a court, whether of limited jurisdiction or not, undertakes to hold cognizance of a cause, without having gained jurisdiction of the person by having him before them in the manner required by law, the proceedings are void; and in the case of a limited or special jurisdiction, the magistrate attempting to enforce a proceeding founded on any judgment, sentence, or conviction, in such a case becomes a trespasser." He then refers to the decision in *Mather v. Hood*, where conviction was held conclusive, but says, neither that case, nor any other, sanctions the doctrine that the want of jurisdiction of the person may not be shown to avoid a conviction before a magistrate.

The statute under which the commissioner acted, contains this clause: "Which discharge, or the record thereof, shall be sufficient authority to the sheriff or jailer for discharging such prisoner; and shall be conclusive evidence in all the courts within this state of the facts therein contained," etc. In the case of *Mather v. Hood* the court held the record of conviction conclusive, and not traversable, when it shows that the justice had jurisdiction, and that he proceeded regularly. The statute does not make the discharge a record until the proceedings shall be filed with the county clerk; but it makes the discharge itself, or the record of it, conclusive evidence of the facts contained in it. A record is also conclusive evidence of the facts contained in it. The discharge, then, is of the same authority as a record. Both are conclusive evidence of the facts set forth in them; and if conclusive, then no evidence can be given to contradict or impeach them. In *Mather v. Hood*, the plaintiff offered to show that the important fact stated in the record, viz., that the party convicted held the premises forcibly, was untrue; but the court

would not listen to the testimony. If this case had gone down to trial upon the general issue, and the discharge had been produced in evidence under a notice, as it might have been, and the plaintiff had then offered to prove the facts upon which he now relies, to wit, that the commissioner, on the ninth of December, adjourned the proceedings to the eleventh, and then refused the application, the case would have been in all respects parallel to the case of *Mather v. Hood*. Such evidence could not have been received. If the discharge could not be contradicted in evidence, neither should it be in pleading.

There is no question arising here as to jurisdiction. The commissioner had by statute jurisdiction of the subject-matter. By the petition and oath of Shepherd, he acquired jurisdiction of his person. The subsequent proceedings, if irregular, are voidable, but not void. They may be reversed on certiorari; but while they remain matter of record and conclusive evidence, the facts stated in the discharge can not be controverted. They, of course, furnish a perfect protection to the officer: See 3 Cowen, 209; *Adkins v. Brewer* [15 Am. Dec. 264]. Whether it was wise in the legislature to put it in the power of officers thus to protect themselves by making their records correct in form, though contrary to the truth, is not a question for our consideration. They undoubtedly knew that if the proceedings of officers, acting under a limited and special jurisdiction, should be erroneous, they might be reversed on certiorari; and that if, upon certiorari brought, the officers, to support their erroneous proceedings, should make a false return, they would be personally responsible to the party injured. Subject to this remedy they seem occasionally to have thought it proper, in relation to delicate and important trusts, though to be executed summarily and by single magistrates, to throw around them the shield of judicial irresponsibility. Seeing this established in relation to certain common law magistrates, should remove doubt, if there be any, as to the conclusiveness of this discharge, though that conclusiveness depends upon statute. It is not a strange or anomalous doctrine. I have supposed it established at common law. We have seen how strongly it is supported. No case has been produced showing that a judge of a court of record has ever been held responsible in a civil action, even for misconduct in office. Holt, C. J., says they have been laid by the heels, and compelled to ask the king's pardon; by which I understand they were removed from office. Indeed, the same reasons operate,

in some measure, to protect them against all suits, whether arising from their errors or their crimes. If an action were to lie at all, it would be easy for every person dissatisfied with the decision of the court, and one party is always dissatisfied, to allege corruption; and thus to harass the judges, whose time and property, if they happen to have any, would be wasted in defending suits which, if not founded in, might be supported by corruption. Hard, indeed, would be the condition of a judge if he were thus exposed to never-ending litigation.

But I forbear to pursue this subject. It is enough, in the case before us, that the statute has made the commissioners' own act not only evidence, but conclusive evidence, of his proceedings. It is not to be contradicted. While the discharge, therefore, remains in force, we must look into that, and nowhere else, for a correct history.

The defendant is entitled to judgment on the demurrer.

Judgment for the defendant.

LIABILITY OF JUDICIAL OFFICERS FOR MISCONDUCT.—See on this point the note to *Yates v. Lansing*, 6 Am. Dec. 303. See, also, *Little v. Moore*, 7 Id. 574; *Gregory v. Brown*, Id. 731; *Jones v. Hughes*, 9 Id. 364; *Tracy v. Williams*, 10 Id. 102; *Reid v. Hood*, Id. 582; *Flack v. Harrington*, 12 Id. 170, and *Adkins v. Brewer*, 15 Id. 264. It was said by Nelson, J., in *Easton v. Calendar*, 11 Wend. 93, that the law relating to the liability of officers possessing special judicial power was "correctly stated" in the foregoing decision. So in *Weaver v. Devendorf*, 3 Denio, 121; *Landt v. Hills*, 19 Barb. 291, and *Gordon v. Farrar*, 2 Doug. (Mich.) 416, the doctrine of the principal case, that a judicial officer is not liable to the party injured, even for gross, intentional, and malicious misconduct, where he acts within his jurisdiction, was approved and followed. In the case last cited this principle was held applicable to election inspectors who rejected the ballot of a person who offered to vote on the ground that he was not a "white" person, because the determination of that question was an exercise of judicial power. The doctrine of non-liability for judicial acts was recognized also in *Houghton v. Swarthout*, 1 Denio, 590; but it was held that where a judicial officer acts ministerially, as in the case of a justice of the peace making a return on appeal to a superior court, he is responsible to the party injured for his errors.

THE PRINCIPAL CASE IS RECOGNIZED AS AN AUTHORITY for the following positions, also: That persons clothed with special judicial power are judges, so far as the exercise of that power is concerned, as in the case of commissioners of estimate and assessment, in matters of street improvement: *Striker v. Kelly*, 7 Hill, 19; that where jurisdiction is once acquired it is not divested by any errors or irregularities in the subsequent proceedings: *Matter of Clark*, 3 Denio, 171; that where an inferior tribunal acts within its jurisdiction, its proceedings, though erroneous, are not void: *Hard v. Shipman*, 6 Barb. 624; *Furman v. Walter*, 13 How. Pr. 358; *Foster v. Van Wyck*, 4 Abb. Pr. (N. S.) 477; and that the record of an inferior court, as to a matter within its jurisdiction, if not defective on its face, is conclusive: *Harrington v. Peo-*

plc, 6 Barb. 611. In *Stanton v. Ellis*, 12 N. Y. 575, 579, it was held that the discharge of an insolvent debtor, by a commissioner under the act, was not evidence of jurisdictional facts stated therein; and Denio, C. J., seemed to be of the opinion that the question in *Cunningham v. Bucklin* was really one of jurisdiction. Referring to the case, he remarked: "I think the court fell into a mistake in supposing that taking up the case, after a discontinuance, did not raise a question of jurisdiction."

WAITE v. LEGGETT.

[8 COWEN, 196.]

MONEY OVERPAID ON A NOTE MAY BE RECOVERED BACK, unless it clearly appears to have been voluntarily paid, with full knowledge that it was not due.

POSSESSION OF THE MEANS OF DISCOVERING THE MISTAKE will not deprive the party of his right of recovery in such a case, if there was a mistake in fact.

OVERCHARGE OF INTEREST ON A NOTE ANTEDATED by mistake, which has been paid by the maker, may be recovered back, if he did not know that it was an overcharge at the time, although he knew the date which the note should have borne, and might have ascertained the amount of the interest by calculation; nor is his right varied by the fact that he gave a bond and warrant to confess judgment as security for the note, in which the amount was calculated according to the erroneous date.

ASSUMPSIT for money had and received. The demand was for money claimed to have been overpaid by the plaintiff by mistake, on a note made by him to the defendant, July 4, 1806, but erroneously dated July 4, 1804. The material facts are stated in the opinion. The defendant insisted that the plaintiff could not recover because the over-payment was voluntarily made with knowledge of the facts. The judge held the action maintainable. Verdict for the plaintiff for sixty-three dollars and sixty-two cents. Motion for a new trial.

J. L. Wendell, for the motion.

C. L. Allen and S. Stevens, contra.

By Court, SUTHERLAND, J. It is admitted that the note for fifteen hundred and forty-six dollars and six cents, given by Waite to Leggett, on the fourth of July, 1806, was erroneously dated on the fourth of July, 1804; and that deducting from the account of Leggett against Waite the interest which has been charged upon the note, as accruing from 1804 to 1806, he has been overpaid to the amount of sixty-three dollars and sixty-two cents, including interest, for which the

verdict was found; and the question is, whether, under the circumstances, this money can be recovered back? It appears from the evidence that when Waite gave the note in question Leggett gave him a receipt for it, correctly dated, on the fourth of July, 1806; and it is contended, that inasmuch as he then had in his possession the means of ascertaining the true date of the note, he is chargeable with knowledge of that fact; and that the payments made by him are to be considered as voluntarily made, with a full knowledge that he was paying more than he was legally bound to pay. That he knew the true date of the note, may be conceded. But the evidence clearly shows that he did not know, that in the calculation made by Leggett, or his attorney, of the amount due, they had considered the note as having been given in 1804, instead of 1806, and had cast the interest accordingly. The last payment made by Waite was on the twenty-fifth of February, 1820; and Mr. Wendell testifies, that subsequent to that day, Waite was furnished, as is clearly to be inferred, for the first time, with a statement of the demands of Leggett, containing charges and credits; that upon receiving the statement he pointed out the mistake in the date of the note, and alleged that he had been erroneously charged with two years' interest upon it; and that allowing for that error, he had overpaid Leggett; and refused to pay the balance then claimed from him. So far, then, from having voluntarily paid the interest for these two years, he did not know that the note had been erroneously dated, or that Leggett had made a mistake in his calculations, until the last payment. He knew he was indebted to Leggett in a large amount, and gave him a bond and warrant of attorney, by way of security, for the sum alleged to be due, without asking for the items, and without any statement having been furnished to him. The whole course of the transaction shows that the judgment bond was not considered by the parties as a final and conclusive liquidation of the amount due. The bond was given in January, 1807, and the judgment was soon after entered up. But in 1812, an omission which operated in favor of Waite was discovered and corrected. Indeed, it was not contended, on the argument, that Waite was concluded by the judgment. The objection to the action was put exclusively on the ground of a voluntary payment. In all the cases cited by the defendant's counsel, the money which was sought to be recovered back, was paid with a full knowl-

edge that it ought not to be paid: 1 Esp. N. P. Cas. 84, 279; 2 Id. 546, 723; 2 East. 469.

New trial denied.

THAT MONEY VOLUNTARILY PAID, with full knowledge of the fact that there is no obligation to pay, can not be recovered, see *Morris v. Tarin*, 1 Am. Dec. 233; *Bulkley v. Stewart*, 2 Id. 57; *Hall v. Shultz*, 4 Id. 270; *Beardsley v. Root*, 6 Id. 386. And if the facts are known, ignorance of the law will not give a right of recovery: *Morton v. Ludlow*, 1 Edw. Ch. 643, citing the principal case. But it was held in *Lake v. Artisan's Bank*, 3 Keyes, 278; S. C., 3 Abb. Pr. (N. S.) 212, on the authority of the foregoing decision, among others, that money paid under a mistake of fact is recoverable, as where an indorser pays a note, erroneously supposing that he has been charged by demand and notice. So, money paid on a consideration which has wholly failed: *Chapman v. City of Brooklyn*, 40 N. Y. 380. So, where money is paid on a judgment valid and binding at the time, but which is afterwards reversed, the payment is not voluntary, and such money may be recovered: *Lott v. Swezey*, 29 Barb. 92. In *Duncan v. Berlin*, 5 Rob. 471, the principal case is cited by McCunn, J., dissenting, as an authority for the general proposition that to constitute a voluntary payment, it must be made with full knowledge of all the facts. As to when the action for money had and received will lie, see the note to *Eagle Bank v. Smith*, 13 Am. Dec. 41.

DE MOTT v. HAGERMAN.

[8 COWEN, 220.]

WHERE ONE LETS LAND ON SHARES to another, the parties are tenants in common of the crop.

DISSEISIN CAN NOT MAINTAIN REFLEVIN FOR GRAIN sown by him on the land of which he has been disseised, which has been cut and removed by the disseisor.

TRESPASS QUARE CLAUSUM FREGIT would lie in such a case for the first entry, and after a recovery in ejectment damages would follow for the mesne profits.

REFLEVIN for wheat and rye. It appeared at the trial that the plaintiffs, De Mott and Billson, had entered into sealed articles of agreement, whereby the former let to the latter a part of his farm, for the year ending April 1, 1825, the said Billson to furnish the seed, and put it in, and deliver to De Mott one half of the produce, less the amount of the seed. Billson having entered and sown wheat and rye, was ousted by the defendants, claiming title in one of them. The defendants harvested and removed the wheat and rye sown by Billson, for which the present action was brought, and remained in possession until November, 1825, when possession was retaken by Mott, but Billson was never afterwards in possession. The de-

fendants moved for a nonsuit, on the ground that the plaintiffs had not shown a joint ownership, and that replevin was not the proper form of action. Nonsuit was ordered on the latter ground. Motion to set the nonsuit aside.

J. Maynard, for the motion. The plaintiffs, being tenants in common, can sue jointly: 8 Johns. 152. The defendants were disseisors: 6 Johns. 197 [*Smith v. Burtis*, 5 Am. Dec. 218]. The plaintiffs, having re-entered, could bring either trespass *de bonis*, etc., or replevin: Pow. on Mort. 212, 214; 8 Wheat. 75, 80. The defendants being trespassers could not gain title by changing the form of the property: 5 Johns. 348 [*Bells v. Lee*, 4 Am. Dec. 368]; 6 Id. 163; *Brown v. Sax*, 7 Cow. 59, and cases cited. They were guilty of a new trespass every day while in possession: 1 T. R. 475.

A. Gibbs, contra. The plaintiffs could not sue jointly, for this, being a letting on shares for a single crop, creates no lease, and the owner alone must bring trespass or replevin: 8 Johns. 151; 13 Id. 235. If there was any remedy, it was trespass *quare clausum fregit*.

By Court, WOODWORTH, J. This was a letting of land upon shares, not a lease, and as to the grain raised, the plaintiffs were tenants in common: 8 Johns. 152; 3 Id. 216 [*Foot v. Colvin*, 3 Am. Dec. 478].

It does not appear in what manner the defendants obtained possession. It is not stated that they wrongfully disseised Billson. If the entry was lawful, the property of the wheat and rye was in the defendants. If it was unlawful, and worked a disseisin, trespass *quare clausum fregit* might have been maintained for the first entry; and after a recovery in ejectment, damages would follow for the mesne profits. But I do not see how the parties can maintain an action for the wheat and rye raised, disconnected from the remedy by trespass. If that be allowable, a plaintiff may sue in trover for wheat or corn raised on land of which he has been disseised, and that, too, before his re-entry. The action of replevin does not lie in such a case. That action is founded on the right of the party. Now, after the entry and occupation of the defendants, the right of the plaintiffs to the crop ceased, though it could be available by an action of trespass, after a recovery of the land by ejectment. In this case we know not by what means one of the plaintiffs was restored to the possession, nor is it material; for had it been by ejectment, the action for mesne profits was the remedy.

It is not necessary to inquire whether the regaining of possession by one of the plaintiffs without suit, inured to the benefit of both, and whether, if so, or if both had in fact entered, they could have an action for damages done after the first entry. It is said in one book: "If a man who once had the possession in fact of real estate quit it, or be deprived thereof, he can not maintain an action of trespass *quare clausum fregit* for an injury done thereto, which was done betwixt the time of his quitting or being deprived of the possession, and his regaining the same by re-entry." Bac. Abr. Trespass, C. pl. 3, cites Bro. Tresp. pl. 365. In another book it is said: "If a man be disseised, after his re-entry, he may have action of trespass against the disseisor for any trespass done by him after the disseisin; for by his re-entry his possession is restored *ab initio*, and all times after." 2 Roll. Abr. Trespass, T. pl. 5. Such seems now to be the settled doctrine: 4 Cow. 338, and the cases there cited. It is enough, however, that this is not an action of trespass. The action is misconceived; and the motion to set aside the nonsuit is denied.

Motion denied.

THAT A LETTING OF LAND ON SHARES IS NOT A LEASE in the technical sense, and does not create the relation of landlord and tenant, and that the owner and lessee are tenants in common of the crop, before division is held, on the authority of the foregoing case in *Caswell v. Districh*, 15 Wend. 379; *Putnam v. Wise*, 1 Hill, 244; *Fiero v. Betts*, 2 Barb. 635; *Dinehart v. Wilson*, 15 Id. 597; *Burdick v. Washburn*, 53 Id. 401; S. C. 36 How. Pr. 475; *Armstrong v. Bicknell*, 2 Lana. 219; *Russell v. Russell*, 32 How. Pr. 407, and *Henderson v. Allen*, 23 Cal. 521. So, even, where the letting is for more than a single year: *Taylor v. Bradley*, 39 N. Y. 135.

REPLEVIN WHERE OWNER IS NOT IN POSSESSION.—Replevin does not lie for slates taken from a quarry where the plaintiff is not in possession, and the defendant is, under a claim of right: *Brown v. Caldwell*, 13 Am. Dec. 660. So replevin will not lie for hay taken from premises of which the plaintiff was not in possession: *Stockwell v. Phelps*, 34 N. Y. 364, where the principal case is cited by Wright, J. In the same case Peckham, J., cites *DeMott v. Hagerman* as authority for the position that where an owner of land is disseised, trespass will lie for the first entry, but not for subsequent acts, until after a recovery of the possession.

DOE EX DEM. DE PEYSTER v. HOWLAND.

[8 COWEN, 277.]

HUSBAND AND WIFE ARE NOT JOINT TENANTS, or tenants in common, of land conveyed to them jointly, being seised *per tout*, but not *per my*; hence they must join in a conveyance thereof, and a conveyance by one is void.

DEED BY A FEME-COVERT NOT ACKNOWLEDGED as required by statute is void. **WIFE'S ACKNOWLEDGMENT AFTER HER HUSBAND'S DEATH** to a deed of land held by them jointly made in his life-time, but not duly acknowledged, does not, by relation, make the deed operative from its execution, but gives it effect as her sole deed from the date of the acknowledgment.

RELATION TO VOID ACT.—There can be no relation to a void act for the purpose of giving it effect.

DEVISE WITH POWER TO CONVEY IN FEE carries a fee, but a devise with power to devise in fee carries only a life-estate.

EJECTMENT. The plaintiff's lessors claimed as the heirs at law of Mrs. Charlton, and the defendant under a demise for forty-two years, at an annual rent, from Charlton to one Roosevelt. The facts were: Charlton and his wife, being seised in fee of the premises, under a conveyance to them jointly, and having no children, made a conveyance in fee to one Munro, expressing their intent that he should convey in severalty to Charlton. This deed was not properly acknowledged by Mrs. Charlton, as required by statute, in her husband's life-time. Munro, however, conveyed to Charlton according to the trust; and Charlton, on May 9, 1804, made the demise to Roosevelt above mentioned. Charlton afterwards made his will devising all his real estate to his wife, without impeachment of waste, declaring that during her life she might dispose of it as freely as if he had given it to her absolutely, appointing her sole executrix, and giving her power, but not requiring her, to sell in fee all his land except the premises in question, and to devise it all without exception. And in case of the wife's not devising, the testator devised to certain other persons. After Charlton's death, in 1806, Mrs. Charlton, with full knowledge of all the facts and of her rights, went before a master in chancery, and acknowledged that she executed the deed to Munro freely and without threats or compulsion from her husband. She declared her intention to abide by the will, received rent from Roosevelt during her life, and died intestate, in 1819; after which the defendant paid rent to the devisees over. Verdict for the plaintiff, subject to the opinion of the court.

J. Anthon, for the plaintiff, insisted upon the following, among other points: 1. That the deed by Charlton and wife, not having been properly acknowledged by the wife during coverture, was the act of the husband alone, and, as they were jointly seised of the entirety, one alone could not convey, so that the deed was void, citing 2 Bl. Com. 183; Co. Lit. 187, 326 a, 353 b; *Green v. King*, 2 W. Bl. 1211; *Doe v. Parratt*, 5 T. R. 654; *Jackson v. Stevens*, 16 Johns. 115; *Rogers v. Benson*, 5 Johns. Ch.

437; *Sulliff v. Forgey*, 1 Cow. 96; *Mary Portington's case*, 10 Rep. 43; *Fowler v. Shearer*, 7 Mass. 19, per Parsons, C. J.; *Jackson v. Cairns*, 20 Johns. 304, per Spencer, C. J.; Plowd. Com. 514; 1 Inst. 121; *Jackson v. Sears*, 10 Johns. 440; 2. That the subsequent acknowledgment could not operate either to give effect to the previous void deed, by relation, nor to make it the widow's deed from the date of the acknowledgment since it described her as *feme-covert*; 3. That the will gave a fee to the wife since it gave her an absolute power of disposition, citing *Goodtill v. Otway*, 2 Wils. 61; *Barford v. Street*, 16 Ves. 135; *Jackson v. Robbins*, 16 Johns. 588; *Tomlinson v. Dighton*, 1 Salk. 239; S. C., 1 P. Wms. 149; *Crossling v. Crossling*, 2 Cox, 395; *Raid v. Shergold*, 10 Ves. 370.

P. A. Jay, contra, claimed, among other points: 1. That although the deed from Charlton and wife was inoperative at its execution for want of proper acknowledgment by the wife, her subsequent acknowledgment gave it effect by relation, citing *Jackson v. Bard*, 4 Johns. 230 [4 Am. Dec. 267]; *Johnson v. Stagg*, 2 Id. 510; *Jackson v. Bell*, 1 Johns. Cas. 85; *Heath v. Ross*, 12 Johns. 140; *Jackson v. Dickenson*, 15 Id. 315 [8 Am. Dec. 236]; Com. Dig. Barg. and Sale (B. 9); *Jackson v. Stevens*, 16 Johns. 110. 2. That at all events the subsequent acknowledgment amounted to a redelivery of the deed: *Goodrich v. Walker*, 1 Johns. Cas. 253; *Verplanck v. Sterry*, 12 Johns. 536 [7 Am. Dec. 348]; or was a waiver of the estate conveyed to her during coverture: Co. Lit. 3 a; *Butler and Baker's case*, 3 Rep. 26 b. 3. That the plaintiff's lessors were estopped by Mrs. Charlton's election to take under the will: *Thelusson v. Woodford*, 13 Ves. 220; *Broome v. Monk*, 10 Id. 616; *Wilson v. Townsend*, 2 Id. 696; *Birmingham v. Kirwan*, 2 Sch. & Lef. 449; 1 Swanst. 394, note; *Ardesoife v. Bennet*, 2 Dick. 463; of which election the devisees may avail themselves at law: Co. Lit. 31 b; Lit. sec. 258; Bro. Baron, pl. 27; Id. *Cui in vita*, pl. 15; 4 Vin. 101; 21 Hen. VI. 24; Dyer, 351 b; *Gosling v. Warburton*, Cro. Eliz. 128; S. C. 1 Leon. 136; Ow. 154; 39 Hen. VI. 26, 27; 4. That the wife took only a life-estate, coupled with a power of devising, under the will: 1 Rob. on Wills, 426; Sug. on Powers, 101, Am. ed.; *Jackson v. Robbins*, 16 Johns. 588; *Goodtill v. Otway*, 2 Wils. 6; *Barford v. Street*, 16 Ves. 136.

By Court, SAVAGE, C. J. Husband and wife holding lands by conveyance to them, are not joint-tenants. They are seised *per tout*, but not *per my*. They are each owner of the whole, but

not of the half. They must both join in a conveyance. They are both necessary to make one grantor; and the deed of either without the other is merely void. The deed from Charlton and wife was signed by both; but as no interest in lands can be conveyed under our statute, by a *feme-covert*, without the proper official acknowledgment, the signing and sealing, and ordinary acknowledgment before the witnesses, are of no effect, and convey no title.

At the death of Charlton, therefore, the whole estate in the premises in question became vested by right of survivorship in Mrs. Charlton. Thus far the counsel on both sides agree. Of this Mrs. Charlton was apprised while she was sole owner. What she subsequently did, was done with the intention of effectuating the object of her husband's will. She, then, when sole, acknowledged that when she executed the deed to Mr. Munro, while covert, she acted freely, and without any threats or compulsion of her husband. Upon the effect of this acknowledgment, the counsel differ widely. The plaintiff's counsel contend that nothing passed by it; that it was not competent for Mrs. Charlton to convey her estate but in the ordinary forms of conveyance. The defendant's counsel contends that the acknowledgment related to the date of the deed, and confirmed everything which had been done; the deed, the lease to Roosevelt, and the will of Charlton.

If, indeed, this acknowledgment was void, and passed no estate, then Mrs. Charlton was seised at her death, and the plaintiff must recover, unless, by her acts, she was estopped from asserting her title. But why should a deliberate act of this kind, by a person competent to convey, be inoperative and void? The instrument contains upon its face everything necessary to a perfect conveyance. She is described, indeed, as a *feme-covert*; and her husband is a party with her; but there is no question as to the identity of the grantor. There is, perhaps, a false description, and a person inserted as grantor, not *in esse*, when she acknowledges the deed. But it is still her act, and her conveyance. It is sufficient for transferring all her interest to the grantee for the purposes expressed. It can not be denied, that after the death of her husband, when she became sole owner, she alone might have conveyed the premises to Mr. Munro. Then does the name of her deceased husband vitiate her deed? Surely not. It is merely surplusage. It has no effect whatever. Suppose a sole owner of a lot of land draws a deed conveying his land upon sufficient consideration, and

in due form; and three or four names are inserted in the body of the deed as grantors, but no one signs except the owner; can he reclaim the land which he has thus conveyed, on the ground that the other grantors did not convey; or can a *feme-sole* avoid her deed by describing her self as a *feme-covert*? Clearly not. On what ground is it, then, that the acknowledgment by Mrs. Charlton, after the death of her husband, is not a perfect execution of the deed. It is very clear to my mind, that this act of Mrs. Charlton amounted to a conveyance of her interest in the premises. Whether her execution of the conveyance had relation back to the time of the original execution by her and her husband, or whether it operated as a conveyance *in præsentia*, it seems to me, can not be very material to the lessors of the plaintiff. If it related back, then the conveyance from Mr. Munro to Charlton is supported. Charlton's will thus becomes operative, and then it is contended that Mrs. Charlton took a fee under the will.

It is undoubtedly true, that a devise with power to convey in fee, carries a fee; though a devise with power to devise in fee carries but a life estate. But the intention of the testator is always a cardinal point in construing wills; and in this case that intention is not left to construction. It is explicitly expressed. An estate for life, and no greater, is given; and as to the lots in question, the wife had no power to sell. All her acts were in affirmance of the will. She received rent on the lease to Roosevelt.

On the question of relation, I can not accede to the position of the defendant's counsel. In all cases where a subsequent act is held to relate back to a thing antecedent, there must be something to which relation may be had; something inchoate, imperfect; but still something.

I shall not go into an examination of the cases; but I think I hazard nothing in the assertion that in none of them was relation had to a void act. In *Jackson v. Stevens*, 16 Johns. 110, Spencer, Justice, speaking of a deed executed by a *feme-covert*, under similar circumstances, says: "It is contended, however, that the acknowledgment of the deed by Mrs. B., in October, 1814, related back to the date of the deed (it was dated in 1795), and rendered it valid from the beginning. But although she signed and sealed the instrument, it was not her deed until she had acknowledged it according to the statute. It could not bind her as a contract. She was not confirming an inchoate and imperfect agreement. The deed took its efficacy from the period of

her acknowledgment, and there was nothing prior to which it could relate." This seems to me an authority in point. The deed of Mrs. Charlton, then, took effect from its acknowledgment. What was that effect? It conveyed all her interest to Mr. Munro, for certain purposes expressed in the deed itself. Whether the trusts in that deed can be executed according to its letter or spirit, or whether they can be enforced at all, are considerations with which we have nothing to do in a court of law. It is the legal title which we are pursuing, and have traced to Mr. Munro. It is, perhaps, unnecessary to pursue it farther. If it remains in Mr. Munro, it is not in the lessors of the plaintiff. If the doctrine of relation or of estoppel is applicable, so far as to confirm the deed of Mr. Munro to Charlton, then it supports the will; and I have already attempted to show that, in that view, the fee can not be in the lessors. If the estate, upon the doctrine of relation or estoppel, vested in Charlton's heirs by virtue of the conveyance or acknowledgment of Mrs. Charlton, then it is out of the lessors. So that, in any view of the subject which I can take, the plaintiff can not recover.

There were many questions discussed on the argument with great learning and ability; but if I am correct in giving effect to the acknowledgment, as of the date of the transaction, then any further examination becomes useless.

I am of opinion that the defendant is entitled to judgment.

Judgment for the defendant.

DEED BY FEME-COVERT NOT ACKNOWLEDGED in the manner prescribed by statute is absolutely void: See *Jourdan v. Jourdan*, 11 Am. Dec. 724, and the cases cited in the note thereto. So held on the authority of the principal case, among others, in *Martin v. Dwelly*, 16 Wend. 19; and *Van Nostrand v. Wright*, Hill & Denio, 262. Nor can it operate as an agreement to convey: *Martin v. Dwelly*, *supra*.

HUSBAND AND WIFE ARE NOT JOINT TENANTS nor tenants in common of land conveyed to them jointly. They are severally seised of the entirety, and not in moieties, *per tout et non per my*, and the survivor takes the whole. Hence, neither can convey without the other: See *Den v. Hardenbergh*, 18 Am. Dec. 371, and note. The authority of the principal case for these positions is approved and followed in *Jackson v. McConnell*, 19 Wend. 178; *Torrey v. Torrey*, 14 N. Y. 432, *per* Denio, C. J.; *Wright v. Saddler*, 20 Id. 324; *Miller v. Miller*, 9 Abb. Pr. (N. S.) 446. But the wife need not join with her husband in an ejectment for land so conveyed, and he can not convey so as to prejudice her right if she should survive him: *Jackson v. Leek*, 19 Wend. 342.

SUBSEQUENT ACKNOWLEDGMENT OF VOID DEED operates as a redelivery. So held, on the authority of *Doe v. Howland*, in the case of a deed which was originally void for fraud, the subsequent acknowledgment having been fairly procured: *Osterhout v. Shoemaker*, 3 Hill, 517.

RELATION, DOCTRINE OF.—For an examination of this subject see the note to *Jackson v. Ramray*, 15 Am. Dec. 246.

PEOPLE v. MANNING.

[8 COWEN, 297.]

PERFORMANCE OF THE CONDITION OF A BOND BECOMING IMPOSSIBLE by the act of God, or of the law, or of the obligee, is excused, and no action lies thereon; as where a recognizance is given for a sheriff's appearance on attachment, and he is sick at the day and afterwards dies.

SUCH RECOGNIZANCE DIFFERS FROM THAT OF SPECIAL BAIL in a civil suit in this respect.

DEBT on a recognizance entered into by the defendants, conditioned for the appearance of one Chapman, late sheriff, etc., on a day named therein, before the justices of the supreme court at Albany, to answer for certain trespasses and contempts for which he had been arrested on attachment. Plea, that on the day named the said Chapman was violently ill, and confined to his house and bed, unable to be moved, and so continued until a certain subsequent day, when he died. Demurrer to the plea and joinder.

J. H. Rathbone, for the demurrer. The defendants were fixed by the non-appearance of their principal, and the plaintiff has the same remedy against them as against special bail for not surrendering their principal. The death of the principal is no defense to the action, but the defendants' remedy, if any, is by motion in court: 1 Arch. Pr. 281; 4 Johns. 407; 4 East, 102; 1 Chit. Cr. L. 92, and cases cited; Crown Circ. Comp. 23; 2 Johns. 104.

A. Gibbs, contra. This recognizance differs from a common bond only in being of record: 2 Bl. Com. 341; and is unlike the undertaking of special bail, which is that the bail will pay if the principal neither pays nor surrenders his body, while here the condition is simply for an appearance, which had become impossible in this case by the act of God.

By Court, SAVAGE, C. J. The only question is, whether the sickness and death of the principal constitute a defense to this action.

The plaintiffs contend that this recognizance is analogous to that of bail in a civil suit, where the death of the principal, after the bail are fixed, can not be pleaded. I apprehend, however, that the cases are not analogous. Here the bail are not fixed. There the undertaking is, that the defendant shall pay, or surrender his body in execution, or that the bail will pay for him. Here the undertaking is simply to appear and answer.

There is no certain liability upon the sheriff, merely because he was arrested upon an attachment. This attachment does not appear to be in the nature of a civil execution. The sheriff, on being brought into court, might have purged himself of the contempt, and had costs awarded to him. No such thing could happen to a defendant arrested on a *ca. sa.*

The recognizance in this case is more like a bond with a condition, a compliance with which has become impossible by the act of God. In such case the non-performance is excused. No action lies.

This view of the case is supported by express authority. It is said, in Co. Lit. 206, a: "If a man be bound by a recognizance, or bond with a condition, that he shall appear the next term in such a court; and before the day the cognizee or obligor dieth, the recognizance or obligation is saved." And the reason assigned is, that the bond or recognizance is a thing in action and executory, whereof no advantage can be taken until there be a default in the obligor; and therefore, in all cases where the condition of a bond or recognizance is possible at the time of making the condition, and before the same can be performed, the condition becomes impossible by the act of God, or of the law, or of the obligee, there the obligation is saved: *Id.*

It is said relief should be sought by motion. Perhaps it might be obtained in that way; but this is no reason against pleading the defense, if it be a bar to the action, as I think it is.

The defendants are entitled to judgment.

Judgment for the defendants.

NON-PERFORMANCE OF CONTRACT, WHAT EXCUSES.—The doctrine here laid down, that where performance of the condition of a bond or recognizance for the appearance of a party, is rendered impossible by the act of God, or the law, or the obligees, this may be pleaded as an excuse for non-performance, is approved and followed in *People v. McCoy*, 39 Barb. 76; *People v. Cushney*, 44 Id. 119; *People v. Cook*, 30 How. Pr. 114; *People v. Bartlett*, 3 Hill, 571; *People v. Tubbs*, 37 N. Y. 588. In the case last cited, the principal was unable to appear at the day by reason of sickness, and this was held a good defense to an action on the recognizance. So in *People v. Cushney*, 44 Barb. 119; and *People v. Cook*, 30 How. Pr. 114, the principal enlisted as a soldier before the day fixed for his appearance, and was prevented from appearing by the officer in command, who was appointed by the state, and it was held that the non-performance of the condition was excused, because it was occasioned by the act of the obligees. So in *People v. Bartlett*, 3 Hill, 571, it was held a good defense to an action on such a recognizance, that the principal was prevented from appearing by his arrest and imprisonment in

another county. The same principle was applied in *Carpenter v. Stevens*, 12 Wend. 590, where, after a judgment for the return of an animal in an action of replevin, suit was brought on the replevin bond, and it was pleaded by way of defense, that before the judgment of the original action was rendered, the animal died, without the party's fault. So in *Wolfe v. Howes*, 24 Barb. 177; S. C., on appeal, in 20 N. Y. 201, the authority of the principal case on this point was recognized; and the same rule was applied to a contract for the performance of certain work in a stipulated time, where performance within the time was prevented by the sickness of the party; and it was held that, notwithstanding the fact that the contract was for that reason not entirely performed, the party might recover, on the *quantum meruit*, for work actually done. So in *Price v. Hartshorn*, 44 Barb. 667, where a carrier was prevented from delivering goods according to his contract by the violence of tempests. So in *Baldwin v. N. Y. Life Insurance Co.*, 3 Bos. 543, one of the conditions of a life policy was that the insured should not go south of Virginia, and the insurers afterwards indorsed on such policy a stipulation that the insured might reside anywhere in the United States, on condition that he was to be north of the southern boundary of Virginia by a certain date. The insured went south and was taken ill, and was thereby prevented from going north at the time, and died south of Virginia; and it was held that the policy was not thereby forfeited. In *Ames v. Belden*, 17 Barb. 515, it was held, citing the principal case, that "the act of God can not be pleaded in excuse of the performance of an express covenant, when compensation in damages may be awarded."

CASES
IN THE
COURT FOR THE TRIAL OF IMPEACHMENTS AND THE
CORRECTION OF ERRORS
OF
NEW YORK.

BRIGGS v. PENNIMAN.

[8 COWEN, 337.]

CORPORATION IS DISSOLVED BY SUFFERING ACTS destructive of the object for which it was instituted; as where a manufacturing corporation ceases to act as such, having expended all its estate and become bankrupt.

MERE ELECTION OF TRUSTEES to keep the corporation in existence will not prevent such dissolution.

STOCKHOLDERS' LIABILITY.—Under a statute making stockholders liable for debts existing against a corporation at the time of its dissolution, to the extent of their respective shares, such liability extends not merely to the loss of the amount of the stock, but to a further sum equal to such amount, if necessary, to pay the debts.

STOCKHOLDERS WHO ARE THEMSELVES CREDITORS are entitled to come in equally with the other creditors in such a case.

ALLEGATIONS IN ANSWER NOT EVIDENCE, WHEN.—Allegations in the answer of stockholders of a dissolved corporation to a bill filed by creditors to the effect that the stockholders are also creditors, are not evidence if not responsive to the bill, and must be proved if material.

WHETHER MERE INSOLVENCY AND INABILITY TO CONTINUE will dissolve a corporation, doubted by Spencer, senator.

UNPAID STOCK is part of the assets of an insolvent corporation, without the aid of any statute, and creditors may compel its collection by the trustees by proceedings in equity. *Per* Spencer, senator.

JUDGMENT OF OUSTER UNNECESSARY.—Judgment of ouster, or other direct judgment against a corporation claimed to be dissolved, is unnecessary, before a suit by creditors against the stockholders under the statute.

EQUITY HAS JURISDICTION OF CONTRIBUTION among numerous parties; hence creditors in such a case may sue in equity.

APPEAL from a decree in chancery. The respondents, who were complainants below, filed their bill against the defendants, now appellants, alleging that the respondents were creditors of

a corporation organized under the act of March 22, 1811, called the Cambridge Farmers' Woolen Manufactory; that all the real and personal property of said corporation was sold on execution in January, 1818; that the said corporation was dissolved November 1, 1818, having exhausted its property, and become bankrupt, and ceased to operate, abandoning all intention of pursuing the objects of its institution; and that the appellants were stockholders therein, stating the amount of their shares respectively. The answer substantially admitted these allegations, except that it denied the indebtedness to the respondents, and the intention to abandon the objects of the incorporation, or that the corporation had ceased to use its powers, claiming that trustees were elected in July, 1818. The appellants also set up in their answer that they had severally made certain specified advances to the corporation, besides paying the amount of their stock, and one of them claimed a further indebtedness of one thousand five hundred dollars. General replication. The respondents' claim was proved as alleged. Other facts are stated in the opinions of Woodworth, J., and Spencer, senator. The chancellor's decree declared that the company was formed and dissolved as alleged; that the debt charged was due to the respondents; that the appellants were stockholders, and liable for the respondents' claim to the extent of their respective shares, if necessary to discharge it. The decree further directed a reference to ascertain the amount of the debt, and the proportions for which the appellants were respectively liable, deducting such an amount due from the corporation when dissolved as had been paid by any of the appellants after dissolution. The chancellor stated his reasons for the decree in his opinion reported in 1 Hopk. Ch. 301-305. From this decree the appeal was taken.

D. Gardner, for the appellants, claimed: 1. That insolvency did not dissolve the corporation; 2. That the stockholders were liable under the statute only to the extent of the price of their stock, which in this case had been fully paid up, so that the appellants' individual responsibility was at an end, which was the view taken in *Slee v. Bloom*, 19 Johns. 456 [10 Am. Dec. 273]; 3. That the appellants were themselves creditors whose claims were upon an equal footing with those of other creditors, and the decree gave the respondents an unjust preference over them; 4. That a dissolution for *nonfeasance* must be adjudged upon process against the corporation: 5 Mass. 230 [*Commonwealth v. Union Ins. Co.*, 4 Am. Dec. 50]; Com. Dig. Franchises,

G, 1-4; and that *Slee v. Bloom*, above referred to, was not an authority to the contrary, that being a case of voluntary surrender and not of dissolution; 5. That there was nothing to show that the corporation did not intend to continue their operations: *Brinkerhoff v. Brown*, 7 Johns. Ch. 217; 6. That the respondents' remedy, if any, was at law.

J. L. Wendell, contra, insisted: 1. That the corporation having been stripped of its property by the execution, and being utterly bankrupt, was *ipso facto* dissolved, and no proceeding by *scire facias*, or otherwise, was necessary to declare the dissolution, relying on *Slee v. Bloom*, 19 Johns. 456 [10 Am. Dec. 273]; 2. That the proceeding by *scire facias*, or information, was inapplicable to corporations of this kind, and lay only against existing corporations, etc.; 3. That the extent of the appellants' liability was the value of their shares beyond what was paid in; 4. That this being a case of contribution, the remedy was in equity.

WOODWORTH, J. It does not appear that any act has been done by the company since their election of trustees in July, 1818, and the first question is, whether the corporation is dissolved, as regards creditors.

The doctrine laid down in *Slee v. Bloom*, 19 Johns. 456 [10 Am. Dec. 273], decides this point. If a corporation suffer acts to be done which destroy the end and object for which it was instituted, it is equivalent to a surrender of its rights. It can not be doubted that a corporation may be dissolved by such a surrender. This is a stronger case, for here the trustees do not possess the power to resuscitate the company, by a call on the stockholders. Their shares are paid; and who would become a new subscriber to an insolvent company?

In *Brinkerhoff v. Brown*, 7 Johns. Ch. 217, the chancellor observes: "It does not follow that a corporation is dissolved, by the sale of its visible and tangible property for the payment of debts, and by the temporary suspension of its business, so long as it has the moral and legal capacity to increase its subscriptions, call in more capital, and resume its business." Testing the matter by this rule, I do not perceive that the corporation possess the moral and legal capacity spoken of. No attempt has been made to revive this company for several years. They have no capital, nor a prospect of obtaining any. They do not even say they hope or expect to resume operations.

I am satisfied the event has occurred when the stockholders become liable to the creditors of the company.

The statute 1 R. I. 247, declares that for all debts due and owing by the company, at the time of its dissolution, the persons then composing such company shall be individually responsible to the extent of their respective shares or stock, and no farther. At the time of dissolution this company were indebted to the respondents, and the appellants became individually responsible in the words of the act. Every stockholder, in a company of this description, incurs the risk of not only losing the amount of stock subscribed, but is also liable for an equal sum, provided the debts due and owing at the time of dissolution are of such magnitude as to require it.

If the stockholders are also creditors, it presents another question which does not appear to have been considered by the chancellor. The question, then, is whether a stockholder who, in addition to full payment for his stock, has made advances and thereby become a creditor of the company, can be compelled to pay the same sum to another creditor who prosecutes (should so much be necessary to satisfy him), without any allowance or deduction for the stockholder's individual debt.

I entertain no doubt, that by a just construction of the act, where there are several creditors, the fund made liable for debts, if insufficient to discharge the whole, should be disputed ratably; and the principle that equality is equity, should be applied to such a case. This conclusion, I apprehend, would correspond with the spirit and intent of the act. It appears to me that a stockholder, who is also a creditor, stands on the same ground, and is entitled to claim under the act, equally as a creditor who is not a stockholder. In the case before us it does not appear that there are any creditors not stockholders, excepting the respondents. The answer alleges, that several of the appellants are also creditors to a considerable amount, stating in each case the sums due to them respectively, on account of advances made and responsibilities incurred for the company. If these allegations are to be considered as evidence, I think the chancellor's decision should be considerably modified, so as to allow the respondents to recover such proportion only of their debt, as they shall appear entitled to, on a distribution of the fund ratably among all the creditors. As the pleadings are framed in this cause, although the court may settle the principle that is to govern, they can not carry it into effect so far as the appellants, who are stockholders and creditors, are concerned.

The cause is not placed in such a state, that a court of equity can award to the stockholders, who are creditors, the several proportions of the fund, as against each other, to which they may be entitled. The answer merely states the fact that they are creditors to a certain amount. This, if evidence, is sufficient to enable the court to decide the extent of the respondents' recovery, but does not lay the foundation for a decree, that the appellants who are creditors may recover the residue of the fund. In order to bring the whole case before the court, and make a final disposition among all the parties entitled, I apprehend it would be necessary for the appellants to have filed a cross bill, setting out their claim to the residue of the fund; and then, if the principle of distribution equally among all had been adjudged correct, the court would decree to each and every creditor his ratable proportion.

There appears to be, however, an insuperable barrier in the appellants' way, to resisting the claim of the respondents for their whole debt. The facts upon which that resistance must rest are not supported by proof. The cause was put at issue, but no witnesses were examined by the appellants. The answer alleging that certain of the appellants were creditors, is not evidence; so that the fact is not before the court. This allegation in the answer is not responsive to any part of the bill, and unless it be so, there is no evidence of a single creditor other than the respondents. The whole of the statement in the answer, relative to the appellants being also creditors, and the specification of the sums due to them, is stated by the case to be in reply to an interrogatory requiring them to state whether or not on the first of November, 1818, the corporation had lost or expended all its estate, property and effects, of every name and nature, and were then entirely bankrupt. In a previous part of the answer, the appellants admitted that all the real and personal property of the company had been sold; and that they knew of no other property or effects, excepting two demands against persons who were bankrupts. It will be seen that the question put had been already substantially answered; but whether so or not, the question whether the company was insolvent, had no connection with the question whether the stockholders, or some of them, were among the number of creditors. The answer, therefore, sets up distinct matters not alleged in, or inquired of, by the bill; and if material ought to be proved. I therefore consider the cause between these parties, as though no suggestion had been made that the appellants were creditors.

It is with regret that I arrive at this conclusion; presuming, as I do, that the claims by the appellants were susceptible of proof. If proven, the effect would be to allow the respondents a *pro rata* distribution only, which, according to the view I have taken, is all they are entitled to claim. But the answer not being evidence in this respect, there is nothing before us to show that there are other creditors besides the respondents. If not, they are entitled to be fully paid, if the amount of stock be sufficient.

The result of my opinion is, that the decree of the chancellor be affirmed.

SPENCER, Senator. On the first point made by the counsel for the appellants, that the company was not dissolved at the time of filing the bill, viz., seventh of July, 1819, it has been argued as if the cause had been brought to a hearing on bill and answer, and as if all the allegations of the answer were to be deemed true. But, in fact, there was a general replication to the answer, which put it in issue; and, according to the case of *Simson v. Hart*, 14 Johns. 63, in this court, "matters set up in the answer by way of avoidance, and not necessarily drawn forth by the bill, must, after a general replication, be proved; or the defendant can not avail himself of them." We are furnished with no proof in the case, and the facts upon which the appellants rely to show that the company was not dissolved, such as the election of trustees in July, 1818, are not before us.

The case of *Brinckerhoff v. Brown*, 7 Johns. Ch. 217, certainly does warrant the argument, that so long as the stockholders elected trustees, and manifested a design *bona fide* to continue the company, it should not be deemed dissolved by a surrender; and the case is clearly distinguishable from *Slee v. Bloom*, in which the defendants admitted the company was dissolved, and abandoned it. I should hesitate in going the length the chancellor appears disposed to go, in his opinion in this cause, that mere insolvency and inability to continue should be deemed a surrender. In *Brinckerhoff v. Brown*, the answer was admitted because there was no replication filed, and it showed there was not a dissolution. But though the answer is denied in this cause, yet there is sufficient matter admitted by it to show a dissolution, if it be considered without reference to the facts averred, but not proved. There is, therefore, no ground furnished for reversing the decree on that point.

On the second point, that the individual corporators are not liable beyond the amount already paid in by them to the com-

pany, even if it be deemed dissolved, it can not be necessary to spend much time. The stock subscribed and agreed to be paid into the company, became corporate property, and when paid in, might be reached by ordinary proceedings; and if not paid in, a court of equity would compel the trustees to collect and apply it to the payment of debts: *Salmon v. The Hamborough Company*, 1 Cas. Ch. 204; 1 Kyd. on Corp. 273, S. C. The same principle was acted upon in the case of *Slee v. Bloom*, in which the stockholders were required, in the first instance, to pay up the amount of their subscriptions, for the benefit of the creditors. This being corporate property, is a fund for the benefit of creditors, existing entirely independent of any statutory provision. Then comes the act: 1 R. L. 247, which declares, that in the event of a dissolution, the stockholders at the time "shall be liable to the extent of their respective shares of stock held in such company, and no further." Surely the legislature did not mean to declare that the stockholders should be liable, as they had already agreed to be liable, and as they were liable at common law. Something more was intended; and it is to my mind very clearly expressed, that the extent of the stock held by them should be the measure of their individual liability to creditors. The statute does not refer to them in their corporate capacity, but as individual stockholders; and it declares their liability without reference to the amount they may have paid in on their stock.

On the point that judgment of ouster, or some judgment directly against the corporation, should be pronounced before it should be deemed dissolved, I entirely concur in the opinion of the chancellor; and should only weaken that ground by attempting to add his reasons. And on the point that the remedy is at law, I also think the chancellor's answer conclusive, that the very principle of contribution by different and numerous parties, gives equity jurisdiction.

Another point has been incidentally urged in argument, that many of the appellants are themselves creditors and are equally entitled with the respondents to be paid. The decree directs the master to deduct from the amounts to be paid by the appellants respectively, such sums as they paid for the debts of the company since its dissolution. I confess I can see no reason why the credit for sums advanced by the appellants should be restricted to a period since the dissolution of the company. The members of the company might *bona fide* advance money as they allege they have done, to carry on the business of the corpora-

tion, and they are equally entitled with any other creditors to be indemnified from the funds of the company or from the individual liability of the stockholders. As the respondents have not obtained any judgment and execution at law, they have not acquired any priority to other creditors. Those appellants who have made advances are clearly entitled to have those advances considered as payments, on account of their individual liability, until the other stockholders have paid equivalent sums; or, what would amount to the same thing, their advances may be consolidated with that of the respondents, to ascertain the amount to be apportioned among the stockholders. Although in this respect the decree is objectionable, yet, as it is merely interlocutory, and a final decree must be had on the coming in of the master's report, an opportunity will then be given to correct it. It does not in itself afford ground for a reversal of the whole decree.

I am of opinion, therefore, that the decree of the court of chancery be affirmed.

"This cause having been heard, etc., it is ordered, adjudged, and decreed, that the decree of the court of chancery be, in all things, affirmed, excepting the part thereof which directs the master as to the allowances to be made to the defendants below, for payments made by them since the dissolution of the company; and that the said decree be affirmed without prejudice to the appellants, to claim hereafter payment for any advances made by them at any time for the company; and that the appellants pay the respondents their costs to be taxed; and that the proceedings be remitted to the court of chancery," etc.

* DISSOLUTION OF CORPORATION IS EFFECTED by a seizure of its franchises: *State Bank v. State*, 12 Am. Dec. 234. As to the legal effect of such dissolution, see the note to that case, Id. 239. As to what is to be deemed a surrender of corporate rights, see *Slee v. Bloom*, 10 Id. 273. Both *Slee v. Bloom* and *Briggs v. Penniman* are frequently referred to in the New York courts as authorities for the position, that a dissolution of a corporation so as to render the stockholders individually liable under the statute for its debts to the amount of their respective shares of stock, is effected by its total insolvency and suspension of business: *Matter of Jackson Marine Insurance Co.*, 4 Sandf. Ch. 562; *Bank of Niagara v. Johnson*, 8 Wend. 656; *Bradt v. Benedict*, 17 N. Y. 99, per Pratt, J. But in the latter case it was held that to have this effect it must appear that the corporation has lost all power to continue or resume its business; and it was further said that the general rule is, that the dissolution must be judicially ascertained and declared, and that the doctrine laid down in *Slee v. Bloom* and *Briggs v. Penniman*, though well established, is a departure from that general rule which must not be extended to cases of a different class. So it was held in *Bank of Niagara v. Johnson*, 8 Wend. 656,

that by such insolvency and suspension of business the corporation is not wholly and finally dissolved for all purposes, but that it is merely a *quasi* dissolution as respects creditors, and that, notwithstanding such dissolution, a receiver of the corporation may maintain an action in its name against a director for paying away a portion of the capital stock to a stockholder. And in *Barclay v. Talman*, 4 Edw. Ch. 128, 129, it was held that the cases of *Slee v. Bloom* and *Briggs v. Penniman*, were "not authority for the position" * * that a voluntary assignment by a corporation of all its property, for specific purposes, is *ipso facto* a dissolution between the stockholders or corporators." If, however, there is a substantial discontinuance of the business of a corporation, a mere annual election of directors will not prevent a dissolution: *Matter of Jackson Marine Ins. Co.*, 4 Sandf. Ch. 562, where it was said that "the argument that there is no such suspension" of an insurance company "so long as it takes or has standing a single riak or policy, is entirely inadmissible."

EQUITY JURISDICTION IN SUCH CASES.—The doctrine of the principal case that a creditor of an insolvent corporation which has suspended business may sue in equity to obtain payment of his debt from the stockholders under the statute, is recognized and approved in *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 479; *Sands v. Kimbark*, 39 Barb. 120; *Case of Empire City Bank*, 8 Abb. Pr. 209, *per* Denio, J.; S. C., 18 N. Y. 211; *Mann v. Pentz*, 2 Sandf. Ch. 270; *Matter of Hollister Bank*, 27 N. Y. 397. And it seems that he may sue a single stockholder in equity: *Mann v. Pentz*, 2 Sandf. Ch. 270. Or he may bring an action at law against him: *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 479. It was held in *Tallmadge v. Fishkill Iron Co.*, 4 Barb. 393; and *Walker v. Crain*, 17 Id. 131, citing the principal case, that a creditor of such a corporation first suing obtains no preference over other creditors, but they may come in and insist on a *pro rata* distribution. And in *Cushman v. Shepard*, 4 Barb. 118, *Briggs v. Penniman* was referred to as an authority that the decree in such a case should direct a reference to ascertain the amount of the debts, the names of the stockholders, and the amounts, if any, advanced by them upon debts of the corporation, over and above the sums paid in on their stock. A bill in equity will not lie in favor of a creditor of a corporation on a mere legal demand not established at law to obtain a discovery of the names and shares of the stockholders, and the appointment of a receiver where there is no allegation of insolvency: *Bogardus v. Rosendale Mfg Co.*, 4 Sandf. 92, citing the principal case.

LIABILITY OF STOCKHOLDERS ON THEIR SUBSCRIPTION.—For an examination of the cases on this subject, see the note to *Franklin Glass Co. v. Alexander*, 9 Am. Dec. 96. In *Fort Edward, etc., Plank Road Co. v. Payne*, 17 Barb. 574, the principal case was referred to as not furnishing any authority for the position that there is any implied promise on the part of a stockholder to pay calls on his shares.

STOCKHOLDERS' LIABILITY FOR DEBTS.—See, on this point, *Bond v. Appleton*, 5 Am. Dec. 111, and *Slee v. Bloom*, 10 Id. 273. In *Remington v. King*, 11 Abb. Pr. 279; and *Garrison v. Howe*, 17 N. Y. 462, the principal case is referred to as an authority on this subject, and it is held that a stockholder may set-off against his liability, in a suit by a creditor of the corporation, the amount of advances made, or responsibilities incurred for the corporation, beyond paying for his stock. The principal case is cited as authority on this point, also in *Aspinwall v. Torrance*, 1 Lans. 384, where it is held that a stockholder who has been compelled to pay debts of the corporation may have an action for contribution against the other stockholders.

THAT UNPAID STOCK IS PART OF THE ASSETS of a corporation to which

creditors have a right to look for payment without the aid of any statute, as affirmed in the opinion of Spencer, senator, *supra*, is a principle which is approved in *Sunger v. Upton*, 13 Bank. Reg. 230; *Winans v. McKean R. R. and Nav. Co.*, 6 Blatch. 222; *Haskins v. Harding*, 2 Dill. C. C. 106.

THAT ALLEGATIONS IN AN ANSWER NOT RESPONSIVE to the bill are not evidence is held, on the authority of *Briggs v. Penniman*, in *Dunham v. Gates*, 1 Hoff. Ch. 189; and *Mason v. Crosby*, 3 Wood & M. 271.

LA FROMBOIS v. JACKSON.

[8 COWEN, 689.]

ADVERSE POSSESSION, PROOF OF.—Refusal by one in possession of land under claim of title to permit a survey of the premises to be made by the true owner, is conclusive proof of an adverse holding.

AN EFFECTUAL DEED IS UNNECESSARY to the commencement of an adverse possession under the statute of limitations.

ENTRY UNDER COLOR OF TITLE, however groundless the title may be, is sufficient, if *bona fide*, to constitute an adverse possession.

POSSESSION AND THE QUO ANIMO of the possessor are the tests.

POSSESSOR'S BELIEF OF THE VALIDITY OF HIS TITLE, from what circumstances inferred.

CLAIM UNDER A WRITTEN CONTRACT to convey, which equity would specifically enforce against the vendor, is a sufficient claim under color of title to support an adverse possession within the statute of limitations.

COURT CAN NOT LOOK BEYOND A SPECIAL VERDICT for the facts.

THAT CLAIM OF TITLE WAS MADE UNDER A FOREIGN GOVERNMENT can not be inferred by the court, so as to invalidate a title by adverse possession, unless specially found by the jury.

SPECIAL VERDICT SHOULD FIND MATERIAL FACTS, and not the evidence of those facts, *per Jones*, chancellor.

TITLE IN THE PEOPLE IS NOT BARRED by adverse possession, short of forty years.

GRANTEE OF THE PEOPLE IS BARRED BY TWENTY YEARS' adverse possession after his title accrued, though it commenced before.

POSSESSION WITHOUT CLAIM OF TITLE never confers title.

CLAIM OF TITLE, HOWEVER GROUNDLESS, makes a possession adverse, and such possession will ripen into title against the people or an individual.

POSSESSION AND SUCH IMPROVEMENT AS IS CUSTOMARY with owners, without disavowal of title, payment of rent, or recognition of title in another, will raise a presumption of an entry and holding as absolute owner.

TITLE PRESUMED LAWFUL, WHEN.—Where a party is in possession claiming title without showing what that title is, it will be presumed lawful. *Per Colden*, senator.

SPECIAL VERDICT SHOULD FIND the fact to be decided on, or evidence which conclusively proves it. *Per Spencer*, senator.

POSSESSION NOT ADVERSE IN ITS COMMENCEMENT may become so by a subsequent claim of title amounting to actual ouster. *Per Spencer*, senator.

DEED UNDER WHICH TITLE IS CLAIMED need not be produced. *Per Viele*, senator.

DEFECTIVE DEED does not prevent possession thereunder from being adverse.
Per Stebbins, senator.

GRANT OF FOREIGN GOVERNMENT may be the foundation of an adverse possession. *Per Viele, senator, denying Jackson v. Waters, 12 Johns. 368.*

ERROR to the supreme court in an action of ejectment. A special verdict was found, stating in substance that the premises in question were included in a patent granted to Dean and others in 1769, and were, after several mesne conveyances, conveyed to the lessors of the plaintiff, May 6, 1819; that the defendant, La Frombois, was in possession at the commencement of the suit; that the father of the defendant being in possession in 1776, when the Americans retreated from Canada, was driven off by the enemy, and his house burned; that he returned in 1784, at the close of the war, rebuilt his house, and remained in possession, claiming title, until his death about twelve years ago, leaving the defendant in possession as his heir at law, who has been in possession ever since; that in 1798 the defendant's father, being in possession, refused permission to the surveyor under Dean's patent, to enter upon the premises for the purpose of making a survey, and he accordingly passed round; that shortly after the revolutionary war, the defendant's father had a writing in his possession in the French language, under which he held, the translation of which was as follows: "La Frombois has permission to take two lots of land in my seigniori on Lake Champlain to settle himself there, and I promise him that when the conveyances of said lots of land shall be made, one of which shall pay no rent, only one sol of acknowledgment; and in case the lot of land which he shall take shall be required to establish the domain, I promise to replace him as much improved land with buildings, etc., as might be found on the said two lots of land. Done at Montreal the twenty-eighth of June, 1768. Francis Mackay;" that the defendant and his father always claimed the land under said writing as their own; that Mackay was an Englishman who lived somewhere near New York; and that the defendant also had in his possession another writing in French, purporting to have been made in 1786, by one Maurice Desdevans De Glandons, calling himself "a sworn surveyor, having a commission from the king of England and from the United States, residing on Lake Champlain, district of Clinton," the substance of which, so far as material, is stated in the opinion of the chancellor. Judgment for the plaintiff in the supreme court. Other facts are stated in the opinions delivered in the court of errors. The opinion of the supreme court was as follows:

"This case can not be distinguished from that of *Jackson v. Waters*, decided by this court, October term, 1815, 12 Johns. 365. It has been contended that that case does not correspond with the other decisions of this court, on the doctrine of adverse possession; by those decisions, it is not necessary to constitute a good adverse possession, that it should have been commenced under a deed for the premises, and if the defendant has a deed he need not produce it; and further, if, on production, it proves to be defective, that does not affect the adverse character of the possession. But these decisions suppose a claim under a title which might be valid. One reason why a possession taken under a claim of title shall, if continued for a sufficient length of time, bar him who has the legal title, is that the defendant is presumed to have entered under a title which he had reason to believe, and did believe, was a good title. The fact of possession, and the *quo animo* it was commenced or continued, are the only tests: 2 Johns. 180. But when he shows a possession taken under a grant from a foreign government, which he is bound to know could make no valid grant, he shows that he could not have supposed he was purchasing a good title. In *Jackson v. Ingraham*, 4 Johns. 122, it was said: 'The court can take no notice of any title to land not derived from our own government, or the province of New York.' The defendant had not the semblance of a legal title, according to the uniform doctrine of this court. On the face of it, it is a nullity, and repels the presumption in favor of the innocence of the defendant, or the *bona fides* of his possession, which would have arisen had he shown a mere claim of title, without showing what that title was. In that case the court would have presumed the title under which he claimed to have been a lawful title; but when he shows his claim to issue from a source whence a good title could not possibly flow, he removes the foundation upon which alone a presumption in his favor could rest."

To reverse this decision, the defendant brought this writ of error. The grounds upon which a reversal was sought sufficiently appear from the opinion.

S. A. Foot, for the plaintiff in error.

T. J. Oakley, for the defendant in error.

JONES, Chancellor (after stating the facts): The evidence shows continued possession of the lot by the defendant and his ancestors, for upwards of thirty-five years, under a claim of title and against all the world. This continued possession is strengthened by the

anterior possession of the father, interrupted only by the incursions of the enemy, and their destruction of his domicile; and it is more materially fortified by the refusal of the elder Frombois to permit the surveyor of the claimants under the patent to enter upon the premises, and the subsequent descent cast from the ancestor to the heir. It might, with plausibility at least, be contended, that the peremptory refusal of the elder Frombois, to permit the surveyor of the patentees to enter upon the lot, and his open resistance to their claim of title to it, amounted to a disseisin; and if so, the descent cast would toll the entry, and the action of ejectment could not be sustained. But if it was not a disseisin, it was a decided act of hostility to the title under which the lessors now claim. It was conclusive proof of an adverse holding. This survey was upwards of twenty years anterior to the commencement of the suit, and from that time, if not from an anterior period, the defendant is clearly entitled to date his actual adverse possession against these lessors, and those under whom they claim. This possession would seem to be conclusive. Why, then, did not his defense prevail? The reason assigned by the supreme court is, that he held under a claim of title derived from a foreign government, and that that claim of title rendered his possession unavailing.

It is found by the special verdict, that the premises were held under a paper writing, which was in the possession of the elder La Frombois soon after the revolutionary war, bearing date June 28, 1768, and signed by Francis Mackay, purporting to be a permission from Mackay to La Frombois to take two lots of land in his seigniory on Lake Champlain, to settle himself thereon, and a promise that when the conveyances of the lots should be made, for one of which he should pay no rent, only one of acknowledgment; in case the lot of land he should take should be required to establish the domain, he would replace to him as much improved land, with buildings, etc., as might be found on the said two lots. The jury find that the defendant's ancestor always claimed the land as his own under this writing; and that he claimed under Mackay, who was an Englishman, and resided somewhere about New York.

The defendant appears, by the special verdict, to have had in his possession another writing in the French language, purporting to be a certificate given in the year 1786, by one Desdevans, who calls himself a sworn surveyor, having a commission from the king of England, and from the United States, residing on Lake Champlain, district of Clinton, stating, that at the request

of Jean Baptiste Lafoi, otherwise called La Frombois, the father, an inhabitant of said Lake Champlain, surveyor of Mr. Francis Mackay, he went to the habitation of La Frombois, and being there, after having examined the title of conveyance of said Seigneur Mackay, he made a survey of the lots, a detailed account of which he gives in the style of a French surveyor, and which certificate he indorses thus: "Copie proces verbal, etc., second of September, 1786."

These documents may be slender evidences of title; but the question is, whether this documentary evidence, slender as it may be, is not sufficient to give a character of adverse possession to the occupancy of La Frombois under it, and to rescue him from the reputation of being a mere trespasser. It is not necessary, to constitute an adverse possession, that it should have commenced under an effectual deed. If the possessor claims under written evidence of title, and on producing that evidence it proves to be defective, the character of his possession as adverse, is not affected by the defects of his title. If the entry is under color of title, the possession will be adverse, however groundless the supposed title may be. The fact of possession and its character, or the *quo animo* of the possessor, are the test.

In this case, the continued possession of La Frombois is conclusively shown, and the *quo animo* is apparant from his uniform claim of title, and continued exercise of acts of ownership. The writing produced, admitting it to be simply a contract for a conveyance, is in accordance with the possession he held, and the claim of title under it. His entire confidence in his title, and his reliance upon its sufficiency to protect his possession, and the assertion of his rights under it against the claim of the proprietors under the patent, are decisive of his own opinion and belief in the validity of his title; and, for aught that is found by the jury in the special verdict, he had reason to believe that the title under which he held was sufficient for his protection. It was an express agreement by a person claiming to have the right to contract for the disposal of the land, to convey to him the lot he should locate, when conveyances were to be given, and an agreement that he should enter into immediate possession, and hold the premises thus contracted to be conveyed to him, without rent, until the conveyance should be given.

Under such an agreement, reduced to writing, and followed up by possession and improvements, the defendant acquired a title in equity to the land, if Mackay, the party contracting to

convey, had at the time or afterwards acquired the right or power to perform his agreement. It was a contract which equity would have enforced the performance of, and the right of La Frombois under it was the more perfect and stable, as the consideration had obviously been already paid or satisfied by him to Mackay, and there was nothing further to be done by him to entitle him to a conveyance of the legal title. Hence, it probably was that he insisted so firmly and peremptorily upon his absolute right to the land, and put his claim to it upon the ground of title, doubtless resting upon some subsequent conveyance in execution of the agreement, or considering his contract tantamount to a deed. It does not expressly appear that he ever obtained an actual conveyance for the lot; but he had an agreement which entitled him to a deed. He may have been in possession of some further muniments which, in the conflagration of his house by the enemy, or from some other cause, had been destroyed or lost. But suppose the contract to have been his only title, it was an absolute engagement of a person assuming to be owner, to give him a deed of conveyance. What reason had he for distrusting the ability of Mackay to give him an effectual deed of conveyance for it? He is found in possession in 1776, and must have taken the possession some considerable time before; for he had made improvements on the lot, and erected a dwelling-house upon it, which he occupied. He was expelled by the public enemy, and continued an involuntary exile from it during the war; but on the restoration of peace, he returned to it as to his domicile, rebuilt his house, repaired the ravages made in his absence upon his farm, and remained in possession during the residue of his life, always claiming the estate, and dealing with it as his own; and at his death transmitting it as an inheritance to his son. During all this long period of time, from 1776, to his death in 1810, his possession and that of his son, from his death to the commencement of this suit, was peaceable and uninterrupted; and with the solitary exception of the act of the surveyor in 1798, which was repelled at once, and the title of the possessor asserted and maintained against him, no adverse claimant appears to impeach the title of the father or the son, or to set up any claim of title in another. Then had not the father, from the time of his entry until his death, the greatest reason to believe that the title he held under Mackay, whether that title was legal or equitable, was valid in law, and gave full protection to his possession and improvements? And

if he had reason to believe, and did believe, his title to be good, as he must be presumed to have entered under that title, his possession having continued for twenty-six years after his return to his home at the close of the revolutionary war, must bar a legal recovery by the plaintiffs, admitting them to have the legal title in this form of action. If there could, under other circumstances, have been any force in the objection that the owners may have been ignorant of the defendant's adverse claim of title, and may have supposed him to hold in subserviency to the title of the rightful owner, the distinct and open avowal to the surveyor in 1798, by La Frombois the elder, of the hostility of his claim to that of the proprietors under the patent to Dean, was full notice to his employers that the possession was adverse to them; and the interval of time between that occurrence and the commencement of this suit, if we place no reliance on the descent cast by the death of the father upon the son, is of sufficiently long duration to bar the remedy by this action of ejectment, by the rightful but grossly supine proprietors of the land.

But the defendant is said to claim his title under a foreign government; and the two writings or documents produced on the trial, are relied upon as evidence to show that such was the character of his claim. I am unable to discover any proof of this allegation in the special verdict. The defendant's claim of title is under Francis Mackay; but how does it appear that Mackay held or claimed under a foreign government? The jury find that he was an Englishman. The agreement he gave to La Frombois was in 1768. At that time the Canadas were provinces of Great Britain, and Mackay appears to have then resided in Montreal. The jury find him to have afterwards resided in the vicinity of New York. The intendment is, that whatever right or title he claimed to the land was under the government of Great Britain, which is admitted to be a legitimate source of title. There is no evidence in the special verdict of any claim of title by La Frombois, father or son, under any foreign government; nor does it appear by the finding of the jury, that Mackay derived his title or made his claim to the land under any foreign power. How, then, can this court act upon the assumption that the possession of the elder La Frombois was taken under a grant from a foreign government? It is said that the facts found show that he intended to hold under the French government. If so, the conclusion must be drawn by this court from the evidence contained in the writing and certifi-

icate, or found by the jury; but the character of the holding, and whether the claim was under the French or English government, was a question of fact for the jury to find. This court can not intend it.

In the case of *Jackson v. Waters*, 12 Johns. 365, which is supposed by the supreme court to govern this, it is expressly stated that the claim was under a grant from the French-Canadian government to one La Gauchetierre, prior to the conquest of Canada; and that fact brought up the question of the validity of a title derived from a French grant in opposition to a subsequent colonial grant, and the effect of the possession avowedly taken and held under such a title. But these questions can not arise on this special verdict. It does not appear by this verdict that La Frombois, the defendant, claimed under a French grant; and we can not look out of the special verdict for the facts of the case. In the case of *Barnes v. Williams*, 11 Wheat. 415, it appeared by the special verdict that the claim of the plaintiff was founded upon a bequest of certain slaves. It was essential to a recovery at law, that the assent of the executors to the legacy should be proved; and Chief Justice Marshall said, that although, in the opinion of the court, there was sufficient in the special verdict from which the jury might have found that fact, yet they had not found it; and the court could not, upon a special verdict, intend it; that the special verdict was defective in stating the evidence of the fact, instead of the fact itself. It was impossible, therefore, that a judgment could be pronounced for the plaintiff. In this case, the jury neither found the fact, nor any sufficient evidence of the fact, that La Frombois held under a French grant. The claim of title to lands within the territory of this state, or the late colony, must be intended to be under the state or colonial government, unless the contrary expressly appears. We can not recur to another case occurring between other parties, and involving other points, and disclosing different facts, for our guide in determining this; and if we could refer to the case relied upon as not being distinguishable from this, we should find it not only between different parties, but for a different lot in the patent. The ejectment there was for part of lot No. 70; here it is for lot No. 72; and if it be conceded that they were both originally included under the same agreement, it does not follow that the subsequent history of both is the same. The objection to the foreign origin of the title, which proved fatal to the defense of lot No. 70, may have been obviated if it ever applied to lot No. 72; and the silence of the special verdict on

this point, is a strong indication of a want of confidence in the objection, or the want of proof to sustain it. If the plaintiff below intended to rely on the foreign origin of Mackay's title, he should have shown it. The defendant reposed himself essentially on his possession; and the agreement with Mackay for a conveyance, was produced to show that his possession was taken and continued under claim and color of title. He had a right to rest upon the presumption that the title asserted by Mackay to the land, was derived from the government of the country, and not from any foreign power; and if the plaintiff chose to leave the matter on that presumption, he can not complain of any prejudice from his election. If, in point of fact, Mackay did claim the premises in question under a French grant, and that fact had appeared in evidence at the trial, the defendant might have repelled its force by showing a subsequent confirmation under the English government, or by some other evidence.

But without speculating upon supposititious cases, I must limit myself to the special verdict, and I think the facts it contains do not warrant me in the conclusion that the defendant's possession was taken under a foreign government, or that the elder La Frombois had any reason to believe or suspect that Mackay, who contracted to convey to him, did not derive the title he claimed to have, from a legitimate source.

I do not consider the agreement of Mackay, or the certificate of the surveyor, as furnishing any conclusive evidence of the foreign character of his title. They contain decisive internal evidence of being drawn up by a French scrivener, or in a French country, and with reference to French laws and usages; and the papers are both in the French language. The contract was made at Montreal, and La Frombois, most probably, was a French emigrant, and it was to be expected that a contract drawn up by a French scrivener, in his own language, should employ the terms which they were accustomed to apply in the description of grants of land. But be that as it may, the circumstance, whatever might be its relative weight and importance, was matter of evidence for the jury; and if parol evidence could be admitted of a fact which, if it existed, must be of record or in writing, was to be urged to them as proof of the fact of the French character of the claim.

But it is said that the agreement of Mackay was anterior to the patent to Dean; and that he could not claim under the English government, or if he had any equitable claim under the colonial government, such claim must have been disregarded. Admit-

ting the colonial patent to Dean to be the only legitimate title to the land, it does not follow that Mackay derived title under a foreign grant, or did not claim under the colonial government. He may have had a pre-emptive right which Dean and his associates afterwards acquired by purchase or otherwise; or he may have assumed to be the owner of the land without any title to it, and when it belonged in truth to the crown. Whatever the right of Mackay was, if La Frombois went into possession supposing it to emanate from a legitimate source, and in confidence that his contract entitled him to a conveyance, and that Mackay had the right to give the conveyance he promised, his possession would be adverse, notwithstanding his confidence was misplaced and the title of Mackay, under whom he entered, was invalid. Whether a grant of the land under the authority of the French government, prior to the conquest of Canada by the British, would vest any title in the grantee, or confer on him the right under the treaty of Paris to a patent from the English government, either absolutely or upon terms, are questions which I consider it unnecessary and improper now to discuss. I assume that whatever right Mackay supposed himself to have to the land, no evidence appearing to the contrary, he founded upon some title or claim to a title under the colonial government; and his assuming to be entitled and contracting to convey gave to the purchaser under him a color of title, which would characterize the possession of such purchaser under such contract, as adverse against all other claimants. If the title was in the people at the time, the possession of La Frombois, the purchaser, under the assumed ownership of Mackay, would not operate as a bar, unless after an actual possession of forty years; but, as against all individual owners, twenty years would preclude the remedy by ejectment. An adverse possession will not obstruct the operation of a patent; and an occupier of land, under an invalid claim of title, must have a continued possession of forty years to bar the people or the grantee from the recovery of the same by suit. But where an entry has been made on land vested in the people, by a private citizen claiming it as his own, and he is suffered to hold the premises for the space of forty years, the person so entering and so holding will acquire the right freely to hold and enjoy the same against the people and their grantees. If, then, the people, after such entry by a citizen, grant the land within the forty years by letters patent to another, the title of their grantee will prevail against the adverse possession of the occupier, if he

asserts his right and evicts the intruder within the time allowed by law for his entry. But the grantee of the people, in common with all other individuals, must perfect his title by entry upon the settler, within twenty years after his title accrues under the patent, or his entry will be barred and his remedy by ejectment lost. The mere possession of land without any claim of right gives no title, however long it may continue; and the true owner may lawfully enter upon such an occupier at any distance of time, because he does no wrong to the occupant, who claims no right. It is the claim of title that makes the possession of the holder of the land adverse to all others; and such a possession as owner, under a claim of right, will be matured by time into a title against the people as well as the citizen; and the effect will be the same, however invalid or groundless the title of the holder may be. To destroy the operation of a twenty years' possession, it must appear that the occupant did not claim to be the owner of the land. The actual possession and improvement of the premises, as owners are accustomed to possess and improve their estate, without any payment of rent, or recognition of a title in another, or disavowal of a title in himself, will, in the absence of all other evidence, be sufficient to raise a presumption of his entry and holding as absolute owner; and, unless rebutted by other evidence, will establish the fact of a claim of title.

Now, in the case before the court, to state it most strongly against the defendant, La Frombois entered prior to the year 1777, under a groundless claim originating in an agreement made before the patent to Dean was issued. This title was without foundation, and a nullity, and the true title was vested in the crown of Great Britain. In the year 1769, being about one year after the agreement between Mackay and La Frombois, under which the latter entered and held, the land was granted by the people to Dean, and the title of the people transferred to the patentees. The possession of La Frombois, if he had then entered under his purchase from Mackay, did not render the letters patent inoperative, but was, nevertheless, adverse in its character against the people; and so continued against their grantees. It had been suffered to mature by time into a right; for upwards of fifty years had elapsed from the date of the patent before the suit was commenced; and more than fifty years had run against the people and their grantees, after the first entry of the elder La Frombois, and after the passage of the act of limitations.

If, then, the benefit of the adverse possession of the defendant was not lost by him by his claim of title under a foreign government, his defense was impregnable; and I am satisfied that this special verdict does not find the fact of a grant of the land by a foreign government, nor any facts justly imputing to the defendant a claim of title under any such grant.

It follows that the lessors of the plaintiff are not entitled to judgment on the special verdict; and that the defense of the tenant must prevail. My opinion accordingly is that the judgment of the supreme court ought to be reversed.

COLDEN, Senator. I shall render my judgment on the special verdict presented by the record without reference to facts which may have appeared in any other case. If the jury in the case we are now deciding have not found that the plaintiff in error claimed under a grant from a foreign government, I shall not assume that he did do so, because in *Jackson v. Waters*, it is stated that the defendant in that case claimed under a patent from the province of Canada. I do not mean to question the law, as it has been stated by the counsel for the defendant in error, on several material points.

I admit that a grant from any other power than that which governed the territory which is now the state of New York, could convey no valid title to lands which are within that territory. I admit that the French Canadian government may never have had authority to grant lands within what are now the limits of this state. I admit, also, that if an adverse possession be claimed under a grant or conveyance which never could have been the foundation of a good title, it can not bar the recovery of one who shows a perfect title.

I believe the law to be consistent with these positions, but I have assumed that it is so without having followed the counsel through that deep research which their arguments and quotations evinced they had made into the history of the European possessions in this country; and as to the extent of the rights which a nation may acquire by discovery or conquest, I do not believe it necessary to settle these points, in order to render a correct judgment in this case, because it is a principle, not only conceded by the counsel for the defendant in error, but established by the supreme court in the case of *Jackson v. Waters*, and in the very judgment under consideration, and by innumerable cases which were cited on the argument, that where a possession is held under a claim of title, which is not shown to

be bad, and which might be good, it shall, after a sufficient lapse of time, bar every other title.

If I could agree with the supreme court that this case can not be distinguished from that of *Jackson v. Waters*, I might not dissent from the judgment they have rendered in favor of the defendants in error; but, in my opinion, there is an all-important difference between the two cases, as to the very fact on which the respective judgments are founded; that is to say, in the former case it is stated that Francis Mackay claimed under a grant from the French government, and no such fact is found by the special verdict under consideration. All that is said as to the title of the plaintiff in error, is that upon the trial he produced a writing in the French language, dated at Montreal, the twenty-eighth of June, 1768, signed by Francis Mackay, by which Mackay gave permission to La Frombois to take possession of, and to settle himself on two lots of his, Mackay's seigniory; and promised that when the lots should be conveyed to La Frombois, there should be only a nominal rent reserved as to one of them; that La Frombois, the father of the defendant below, always claimed the land under the above-mentioned writing, and that the defendant below was left in possession at the death of his father; that he claimed as heir at law of his father, and continued in possession up to the commencement of the suit.

The importance of the difference of the facts presented in this case and that of *Jackson v. Waters*, is marked by the expressions of Chief Justice Thompson, in rendering the judgment in the latter case. He says: "The origin of the adverse possession set up by the defendant, was that taken by La Frombois in the year 1763, by permission of Mackay, who claimed under a grant made by the French government of Canada to La Gauchetierre, prior to the conquest of Canada by the British."

There was another writing which the jury do not say the defendant below produced, or that he attempted to make any title under it; but merely that he had in his possession, at some time or other, such a writing. It appears to be a memorandum, or *proces verbal* of a survey made by a person styling himself a sworn surveyor, having a commission from the king of England and the United States. This instrument, either in French, or as it is translated into English, is not very intelligible. I have not endeavored to understand more of it than to be perfectly satisfied that it can have no possible bearing on the questions

which arise in this cause, unless it be to show the extent and limits of the possession of La Frombois. La Frombois, the elder, and his heir, had, under the writing first above-mentioned, and his long possession, a good equitable title against Mackay, and all claiming under him; for though it may be, as Chief Justice Thompson says, in the case of *Jackson v. Waters*, that La Frombois, if he had been out of possession, could not have maintained an action on his title from Mackay; yet, being in possession, and having been so for such a length of time, he could not have been turned out by Mackay, or any claiming under him. Yet the very learned and satisfactory judgment *raisonne* (if I may be allowed to use a term for which our own language does not furnish an equivalent) of Lord Erskine, in the case of *Hillary v. Waller*, 12 Ves. jun. 266, and numerous cases in our books, all appear to me to establish that a grant from Mackay to La Frombois, after a possession of much less endurance, would be presumed, in order to support his title from Mackay. Then the question is what was Mackay's title? Are we to assume that it was under a French grant? There is no earthly evidence of this than that the writing of the twenty-eighth of June, 1768, is in French, and that it is dated at Montreal. Any presumption arising from these facts, slight as it is, is repelled by the further finding of the jury that Mackay was an Englishman, and resided somewhere about New York. Unless, therefore, we resort to the case of *Jackson v. Waters*, and take the facts of that case as if they were found by a special verdict in this case, which I do not feel myself at liberty to do, we have no proof that the defendant claimed under a French grant.

Then it appears to me that I may adopt the language which the supreme court used in giving their reasons for their judgment in this case. They say if the defendant below had shown a mere claim of title, without showing what that title was, they would have presumed his title to have been a lawful one, and the judgment would have been in his favor. In my opinion, this is exactly what the defendant did do. He showed that he entered under Mackay; but what Mackay's title was, whether he claimed under a patent from the province of Canada, from Great Britain, or from the provincial government of New York, there is not a sentence in the finding of the jury which will warrant any conclusion or even presumption.

To render the same judgment in this case as in the case of *Jackson and Waters*, I must say, with all that respect due to the

supreme court, and which I unfeignedly feel, is to give like decisions where the important facts are totally different. It seems to me that if ever a possession ought to be supported, it should be in this case.

A father, fifty-two years before his title is questioned, takes possession of lands under a permission to settle himself upon them, from a person who, he thought, had, and who, for all we know, may have had a right to grant the permission, with an implied promise that the lands, or other equivalent lands, should be conveyed to the occupants. After being in possession eight years, he is driven from his home by the ravages of war. At the end of seven years, when peace is restored, he returns to the possession he had been obliged to forsake, and rebuilds upon it a house, which he found had, in his absence, been destroyed. After this he remains undisturbed thirty-six years, and then dies, transmitting his possession to his son and heir, who occupies the home his father had left him ten or twelve years more before his title is questioned. Then, at the end of fifty odd years, and after a descent had been cast, come persons claiming under a title which commenced more than fifty years before they, or those under whom they claim, make any legal assertion of their right. In the mean time they, that is, those who claim under the patent of 1769, knew of the possession of the ancestor of the defendant below, and of the defendant's possession and claim. In 1798, that is, twenty years before the cause was tried, the father of the plaintiff in error forbid the surveyors under Dean's patent entering on the premises, and the surveyors passed round his lots. From that time there was an acquiescence in the claim of the defendant below; at least, there is nothing to the contrary found by the jury. In the mean time the defendant has been spending his life and labor on the spot he inherited from his father.

Under these circumstances, I feel no reluctance in giving a judgment in favor of the plaintiff in error. I can not think the defendant will have any reason to complain if the law does not give effect to a title on which he has slept more than half a century. "*Vigilantibus non dormientibus leges subserviunt.*" My opinion is, that the judgment be reversed.

SPENCER, Senator. In this case it was not seriously questioned on the argument that there was a sufficient adverse possession shown in the plaintiff in error, La Frombois, to bar the action, provided it was under a claim which might be a valid one; and we are, then, first to inquire what, in fact, was the claim of the

elder La Frombois? The special verdict says that "at the close of the war in the year 1784, he rebuilt his house, and entered into the possession of the premises, claiming them as his own until the time of his death, about twelve years since, and left the defendant in possession, who claimed as heir at law of his father, and continued in possession up to the commencement of the suit;" and in another part, that "he always claimed the land as his own under the writing" set forth. If anything in the law of ejectment is settled, it is that "it has never been considered necessary, to constitute an adverse possession, that there should be a rightful title. Whenever this defense is set up, the idea of right is excluded. The fact of possession and the *quo animo* it was commenced and continued, are the only tests." I quote the language of the supreme court contained in 9 Johns. 180, and repeated in 18 Id. 44, and in Id. 355, where the defendant produced a piece of paper as a deed, which could not operate as such for the want of a seal. It was held, notwithstanding, that his possession of twenty years under a claim of title was adverse, that he was not bound to produce a deed, and that his claim of title was sufficient without proving it. So, in the case of *Jackson v. Woodruff*, 1 Cowen, 286 [13 Am. Dec. 525], the supreme court were with the defendant for the land actually possessed, although the deed under which he claimed did not describe any lands. Woodworth, J., says: "If the title is bad, it is of no moment; but if no lands are described, nothing can pass. The deed is a nullity, and never can lay the foundation of a good adverse possession beyond the actual improvement." In the present case, the special verdict finds that La Frombois was in actual possession of the whole of the premises from 1784. Upon these authorities I do not perceive why we are not bound entirely to disregard the paper signed by Mackay, which was introduced by the defendant, and which has given rise to the only question in the cause upon which the supreme court decided. This possession, accompanied by claim of title, was good without the paper; and if that paper does not make it any worse.

The great and decisive distinction between this case and that referred to by the supreme court in 4 Johns. 182, is, that in that case the defendants set up and relied upon a paper title under the French government in Canada, which he attempted to deduce down to himself, against the paper title of the plaintiff, and did not rely upon a possession with claim of title, and the court very properly say they can not recognize any such title. But in the present case the defendant relied on his pos-

session, and did not set up a paper title from the French government. There is, then, in truth, no conflict between the cases in 18 Johns. and 1 Cowen, and that in 4 Johns.; the former are decisions upon the effect of a possession; the latter upon the validity of a paper title. The former are strictly applicable to this case, and appear to me to dispose of it.

Another ground of distinction between this case and that in 4 Johns. urged by the counsel for the plaintiff in error, is that the production of the paper signed by Mackay was not a claim of title under the French government, and this seems to me to be well taken. There is certainly nothing on the face of the paper to show that Mackay's title was derived from that government. If he did so derive title, that fact should have been found by the special verdict, unless the evidence be so conclusive that there is no room for doubt that the jury must have found it so. But no such case is presented here, and the plaintiff who seeks to avoid a title *prima facie* good, by some matter which entirely destroys it, is most clearly bound to establish that matter beyond controversy. No one will pretend that it has been done in this case; no one can say that the paper on the face of it, and that is the only evidence we have, shows whether Mackay derived under the English or the French government. The fact which was supposed by the supreme court to constitute the analogy between this case and that of *Jackson v. Waters*, 12 Johns., wholly fails.

The counsel for the defendant in error have urged that the entry of La Frombois originally could not have been under an adverse claim, because the title was in the crown of Great Britain, against which the statute of limitations could not run, and that a possession must be adverse in its commencement. The fallacy of this objection is, that it confounds a claim and a rightful title. The authorities before cited show that it is wholly immaterial whether the title claimed be rightful or not; it is sufficient if there be a claim of some title. If the objection was good in this case, it would hold equally against any defense under an adverse possession, where the rightful title was shown to be in another. The very idea of an adverse possession admits a hostile rightful title. So, whether the rightful title was in the crown or in a subject can make no difference. If the crown were to prosecute, then it might deny the application of the statute of limitations; but it does not belong to a citizen to avail himself of a prerogative not conferred on him. The statute operates on plaintiffs and their remedy, and has no connec-

tion with the merits of the defense. *La Frombois'* possession was adverse to the whole world, and although it would not constitute a defense against the crown, yet it does against everybody else.

But the objection is unfounded in point of fact, for it appears that the patent to Dean and his associates was on the eleventh of July, 1769, and the first date given in the special verdict respecting the possession of *La Frombois* is in 1776. When he entered, therefore, the title was not in the crown of Great Britain.

There is still another view of this case. Admitting that *La Frombois* did not enter under color of title originally, yet we find him in 1798 claiming the land as his own, and forbidding and actually preventing the surveyor under the lessors of the plaintiff below from coming upon the premises. Here is a decisive act of disseisin of the patentees, and actual ouster and expulsion: 6 John. 217; 4 Id. 411. He remained in possession twenty years, and died, leaving his heir at law in possession, who remained there, claiming as such heir twelve years before the suit was brought. In such a case an action must be brought within a year and a day after the death of the disseisor and the descent cast. Although this is not made a point precisely in this light, yet these facts are presented to us as evidence of an acquiescence by the lessors of the plaintiff in the title of *La Frombois*. I do not think they establish such acquiescence, but in my view, if it be admitted that *La Frombois* did not enter under a claim of title, but wrongfully, then there has been a disseisin and a descent cast, and the plaintiff is effectually barred on that ground. But if it be admitted that he did enter under a claim of title, then his possession is adverse, and more than twenty years having elapsed, he can not be disturbed by this action. Whichever ground is taken, the result is the same, and the plaintiff had no right to recover.

We have the authority of this court in *Palmer v. Lorillard*, 16 Johns. 348, for determining this cause on the last point stated, of a disseisin and descent cast, because it is an objection which goes to the foundation of the action, which the defendant can not be presumed to have waived by his silence, and which the plaintiff could not have remedied by any evidence, for the proof is already before us in the special verdict, that the defendant was in undisturbed possession until the commencement of this suit, and the plaintiff's lessors, therefore, could not have commenced a suit within a year and a day after the descent cast.

In my opinion, the judgment of the supreme court should be reversed.

STEBBINS, Senator. It is found, by the special verdict in this cause, that La Frombois the elder was in possession of the premises in question in 1776, and that he always claimed the ownership under the writing from Mackay, set out in the verdict.

At what time La Frombois entered is not found; but except a few years during the war, he appears to have remained in possession from 1776, during his life, and to have transmitted that possession to his son, the present plaintiff in error. The defendant in error claims under Dean's patent, issued by the colonial government in 1769. In 1769, when the premises were surveyed under Dean's patent, La Frombois was in possession, asserting his claim of title, and forbade the surveyors entering upon his premises.

The supreme court, in *Jackson v. Ingraham*, 4 Johns. 182, decide that a title to lands not derived from our own government, can not be recognized as valid; and in *Jackson v. Waters*, 12 Johns. 365, it is decided that an entry under color of such a title does not constitute an adverse possession as against a patent subsequently issued, for it appears in the last case, that La Frombois entered as early as 1768, and the patent issued in 1769.

The question in this case, I apprehend to be materially different from the one presented in *Jackson v. Waters*, inasmuch as it is not found in this cause that La Frombois was in possession at the time of issuing the patent; and therefore the doctrine that there can be no possession adverse to the people, is inapplicable. The cases abundantly prove, in the language of the supreme court in this cause, "that it is not necessary, to constitute a good adverse possession, that it should have been commenced under a deed for the premises; and if the defendant has a deed he need not produce it; and further, if on production it proves to be defective, that does not affect the adverse character of the possession; and that the fact of the possession, and the *quo animo* it was commenced, are the only tests." And one reason of this doctrine of adverse possession is said to be, that the defendant is presumed to have entered under a title which he had reason to believe, and did believe, was a good title.

Now *quo animo* did La Frombois enter in this case? Did he not believe his title to be a good one? Had he not reason to

believe it good? Perhaps a man better informed would have had less confidence in such a title; but I have no doubt he entered upon the premises, at that early day, in full confidence that he was acquiring a possession and a title which would descend as an inheritance to his posterity. He certainly defended it as such against the surveyors under Dean's patent.

But it is said that he was bound to know that a title derived from the French government was invalid, and that it affords him, therefore, no color of title. The effect of this reasoning is, to place a person who enters under a claim of title which he may, in good faith, believe to be a good one, in a worse situation than one who enters under no title at all. I apprehend, a person entering under lands without any title, or under a defective title, is as much bound to know that, by the law of the land, he has no good title, as one who enters under a French grant; particularly when the latter enters (as La Frombois did in this case), before any adjudication against the validity of such grants.

In my opinion, the judgment of the supreme court ought to be reversed.

VIELE, Senator. The only question which was presented by the argument in this case is, whether the defendant in the court below had such possession of the premises sought to be recovered, as furnished a legal bar to the plaintiff's right of action.

By the special verdict it is found that La Frombois, the father of the defendant, was in possession of the premises in 1776, when he was driven off, and his house burned by the British troops in the ruthless progress of their invasion; after which he joined the American army, and returned at the close of the war, in 1784, resumed the possession, claiming the land as his own, rebuilt his house, and continued that possession and claim until his death, about twelve years before the trial; that the defendant succeeded to his father's possession and title, as heir at law, and so continued until the commencement of the suit in 1820; that La Frombois the elder during his life, and the defendant after his death, had always claimed the land as their own under one Mackay, an Englishman, who lived near New York, from whom the elder La Frombois had a writing, permitting him to take two lots, dated in 1768; and that in 1798, when Dean's patent, the source of title to the plaintiff, was surveyed for the purpose of partition, the surveyor was forbid coming on to the premises by the elder La Frombois, and he consequently passed round his lot.

The facts contained in this verdict present to the consideration of the court a question of vast importance to the security of property, as well as the repose of society, upon which there has been some diversity of decision, and in relation to which so much of speculation has been indulged that it can hardly be considered as settled upon sound and distinct elementary principles. Indeed, so great is the obscurity in which the progress of judicial construction has involved the provisions, apparently simple, of the statute of limitations, emphatically and appropriately styled "the statute of repose," that were the statute itself erased from the books, it would be difficult or impossible to ascertain, with any degree of certainty, from the numerous decisions that have been made upon it, what had been its original provisions. It becomes the duty of this court, as one of *dernier ressort*, and to whose decision, as such, the subject is now for the first time presented, to examine it with care, and endeavor to place it upon the basis of original legislative enactment. And as a frequent recurrence to first principles in any science is the greatest safeguard against error, so will a judicious investigation of the policy and terms of the statute tend to a correct determination of its applicability to the case under consideration. More than two centuries have elapsed since the enactment of the English statute of limitations, 21 James I. ch. 16, and which has been adopted in this country, and was substantially re-enacted soon after the organization of our government. It was adopted in England after near a century of experience under a statute of Henry VIII., of more than double the period intended, and calculated "to impose diligence on, and vigilancy in him that was to bring his action;" and it has been sustained by the united concurrence and approbation of all succeeding legislators and jurists to the present time. No one who has reflected upon the subject, and whose observation and experience qualify him to judge, but will sanction and applaud the wisdom and policy of a statute the object and obvious tendency of which is to promote the peace and good order of society by quieting possessions and estates, and avoiding litigation. But for the intervention of the statute, there would be no end to the revival of dormant and antiquated titles, and many an honest citizen who now, by its benignant operation, enjoys in security the few acres his industry has acquired, and which have been improved by his labor and enriched by "the sweat of his brow," would be driven from his home by an enemy

more insidious and more destructive to the peace of the community than an invading army.

Going upon the presumption that a valid claim will not be forborne for any great length of time, and that a possession and occupancy, bearing an aspect of right, will not be acquiesced in but for some availing reason, the legislature intended to give a force and efficacy to such evidence of right that should make it effectual to the protection of him who had the advantage of it; and for that purpose it was enacted: 1 R. L. 185, "That no person shall, at any time hereafter, make any entry into any manors, lands, tenements, or hereditaments, but within twenty years next after his right or title descended or accrued to the same."

Such having been the evident policy, and such the plain words of the statute, it would seem by its very terms, to impose upon the party seeking to recover, the necessity of showing affirmatively his title not only, but that the right to possession under that title has accrued within the time limited by the statute, and that it could, therefore, make no difference, however defective and groundless was the title or claim of title on the part of the possessor. This appears to me to be the plain and obvious import and effect of the statute; and it was once the established doctrine of the courts, that if there had been no possession in the lessor of the plaintiff or his ancestors for twenty years, the plaintiff would be nonsuited: Run. on Eject. 58; Esp. Ev. 195, 196; Balan. on Lim., 18 Burt. Rep. 119, unless he shows himself within some of the exceptions of the statute. And such was the language of Lord Mansfield in *Taylor v. Atkins*,¹ decided in 1757. And it is for this reason that the defendant is not bound to plead the statute of limitations in ejectment, as he is in other actions: Run. on Eject. 234. Under this rule, the possession of the tenant is always considered the possession of the landlord; and payment of rent, or any distinct acknowledgment of title, is held to be sufficient evidence of tenancy; and wherever the premises are unoccupied or unimproved, as is frequently the case in this country, the title, by operation of law, draws to itself the only possession of which the subject-matter is susceptible.

But it has been contended on the argument, and such is the uniform tenor of the decisions, that the possession of the defendant, in order to be available under the statute, must be adverse to the title of the claimant; and this being conceded,

1. *Taylor ex dem. Atkins v. Horde*, 1 Burr, 60.

leads to the important inquiry as to what constitutes an adverse possession. It is a general rule, that every possession of land has the presumption of right in its favor: 10 Johns. 356; and this being a presumption of law, may be contradicted or destroyed by proof; but until it is destroyed, the possession is adverse to any other claimant. The presumption which the law thus raises in favor of the actual occupant may be destroyed by proof of his having received a lease, or evidence of his having paid rent, or acknowledged the title set up; or it may be destroyed by showing that the occupant entered without pretending to any claim of right whatever; in which case the law adjudges the possession to be in subservience to the legal owner: 16 Johns. 301; for he can derive no benefit from a legal presumption, who, by his own acts, shows that the presumption can not apply; the fact that no claim of right was made, showing that none existed. Hence, a claim of right is necessary, not because the statute required it, but because the want of such claim is evidence sufficient to destroy the legal presumption of right. The *quo animo* a possession is taken or held, furnishes the test of its character; and the intention being to be inferred from circumstances, and being of the proper cognizance of the jury as a matter of fact, they will be warranted in inferring from the circumstances that no claim of right was made, and that the party entered for the benefit of the true owner, whenever he shall choose to assert his title. Herein the principles applicable to a right of entry into land are analogous to those which are applied to actions upon contracts; and whoever supposed that it was necessary in the latter case for the defendant to show himself to have been adverse to the payment of a promissory note, to which the policy of the statute had, in consequence of lapse of time, applied the presumption of payment? But when the facts and circumstances will warrant the jury to infer an admission that the debt remains due and unpaid, it destroys the presumption of payment which it was the policy of the statute to enforce, and leaves to the plaintiff a clear legal right to recover. Every possession, then, is adverse, and entitled to the peaceful and benignant operation and protecting safeguard of the statute, which is not in subservience to the title of another, either by a direct acknowledgment of some kind, or an open or tacit disavowal of right on the part of the occupant; and it is in the latter case only that the law adjudges the possession of one to the benefit of another.

According to these views of the subject, the possession of the

elder La Frombois was hostile to the plaintiff's title at its commencement, or from the moment the patent was issued to Dean; and also in 1769, if the possession had commenced as early as that. But it is not necessary that a possession should have an adverse character in its inception, if it acquire such character afterwards, and maintained it for a sufficient length of time to allow the statute to become a bar. And this character may attach without any new evidence of title, or the acquisition of any new title.

Thus it is well settled that the possession of one tenant in common is the possession, or enures to the benefit, of his co-tenant; and it is equally well settled that such possession, if sole, may become adverse to the co-tenant, merely by a public notorious act or claim: 5 Wheat. 124; 7 Id. 120. So it has been held that a subsequent act may explain a preceding entry; as where a parcener entered into possession of the whole of a vacant possession, and made a feoffment in fee: *Per* Kent, C. J., 9 Johns. 182. No claim could be more public, or more hostile in its character, than was that of La Frombois in 1798; and it was so far acquiesced in at that time, that no entry was then made upon the premises for the purpose of surveying, nor has any entry since been attempted, notwithstanding this open and bold defiance, until the commencement of this action, in 1820, a period of twenty-two years.

But the supreme court, in this case, base their decision upon the authority of *Jackson v. Waters*, 12 Johns. 368, where it is held, that "the doctrine of that court in relation to adverse possession is, that it is to be taken strictly, and is not to be made out by inference;" that "every presumption is in favor of a possession in subordination to the title of the true owner;" and that a title derived from a French grant, because it was not a valid source of title, could not be the basis of an adverse possession.

It might perhaps be sufficient to deny the applicability of this case to the one under consideration; because it is not found affirmatively, or by inference in the special verdict, that the defendant's title has its source in a grant of the French colonial government; but with all due deference to the intelligence and learning which adorned the bench of that court at the time that decision was pronounced, and no one feels a higher veneration for its character, or more proud of the luster it has shed upon our history, than I do, I am constrained to the opinion, that the decision is not the true doctrine of that court, nor is it in ac-

cordance with the law of this land. In 10 Johns. 356, the court, *per* Kent, C. J., maintain the doctrine that a possession for twenty years, under pretense of right, ripens into a right which will toll an entry; and that every possession has the presumption of right; in 9 Johns. 180, *per* Spencer, J., that it has never been considered as necessary to constitute an adverse possession, that there should be a rightful title, and that whenever this defense is set up, the idea of right is excluded. The same doctrine is held, *per* Woodworth, J., in the same words, and sanctioned by the court, in 1 Cowen, 285: *Jackson v. Woodruff*, 13 Am. Dec. 525. And it is there also stated to be well settled, that a possession of twenty years, under pretense of right, will toll an entry.

And what is to this court of more binding authority, because derived from the source where the power to direct what the law shall be rests, the policy and express terms of the statute protect every possession under pretense or claim of right, without the least regard to the validity of the source whence that claim is derived.

With a sincere desire to arrive at the truth in the investigation of this case, I am gratified in coming to the conclusion, that law and equity combine with the best feelings of the heart, to protect a possession, which appears to have been commenced in good faith, and has been adhered to under privations and sacrifices, with a zeal and pertinacity that yielded only to a deeper devotion to the cause of our country in the hour of her peril, against a claim which, to say the least of it, has been culpably kept dormant, until it has become too antiquated to find favor at the hand of justice.

I am accordingly of opinion, that the judgment of the supreme court ought to be reversed; and that judgment ought to be rendered upon the special verdict for the defendant.

JORDAN, Senator. The lessors of the plaintiff below deduced a regular title under the letters patent to Dean and others; and are entitled to judgment, unless the defendant made out such an adverse possession as will constitute a bar to the action.

It appears to me unnecessary to agitate the question, whether possession taken under a French grant could or could not, under any circumstances, ripen into a perfect title by the lapse of years. My impression is it could not, provided, at the time, the premises were upon territory disputed by the sovereigns of the two countries, or within the acknowledged limits of the British colonial government. Without this qualification, how-

ever, if the cause turned upon that point, I might entertain a different opinion. Nor do I think it necessary to consider whether there was evidence of such an actual disseisin, as would toll the right of entry on the death of the ancestor. Upon that point I should entertain serious doubts.

As a general rule, where possession is taken under color of title and continued for twenty years, it bars the action of ejectment; and it is immaterial how defective that title may be, or whether the occupant makes color under a written or parol contract, or even any contract at all.

The defendant having established, as I conceive, a *prima facie* title, by the length of his possession, it became necessary for the lessors of the plaintiff to show that the possession commenced upon the basis of a title which the defendant was bound to know could not be asserted at law; and it is contended that the testimony introduced by the defendant himself, affords evidence of that fact, or, in other words, that his title set up was of French origin. I can not so consider it; and, in saying this, I intend to confine myself to the finding of the jury in this case, and not to go beyond it. Mackay, under whom the elder La Frombois claimed, was an Englishman, residing somewhere about New York. The writing, it is true, such as it was, from him to La Frombois, was in the French language and contained expressions peculiar to French titles; but Mackay's title or claim of title was not shown, and to presume it of French origin, merely because of the language employed in drawing, or expressions introduced into the contract, would, in my judgment, far exceed the bounds of legal reason. It is a presumption in which I should not be disposed to indulge in any case, and especially in a case like the present, where the party comes supported by a possession so ancient and meritorious, so unequivocal in its nature, and so long acquiesced in by the proprietors of Dean's patent. It is easy to account why the writing, from Mackay to La Frombois, was drawn up in French and executed in Montreal, consistently with a perfect available possession and claim on the part of La Frombois. The premises were at that time in a wilderness; the nearest place where the business of civilized man was carried on, to any considerable extent, was that where the writing bears date; the grantee, as the name would import, was a Frenchman, and probably a French conveyancer was employed to transact the business.

We find the memorandum drawn up by De Glandons, the surveyor, in 1786, is also in French. This was many years after

the treaty of Paris, after all claim of dominion by the French government in that quarter ceased, and several years subsequent to the American revolution; at a time, too, when he declares himself acting under a commission from the king of England and the United States. If a presumption of French authority is derived from the use of the French language in the former case, why is it not so in the latter? And yet in the latter case there is positive evidence to the contrary.

It appears to me the supreme court assumed a controlling and governing fact, in no way warranted by the case, the absence of which distinguishes this from *Jackson v. Waters*, 12 Johns. 365, and, therefore, that this case is not within the application of the rule of law there laid down, admitting it to be correct; and I am accordingly of opinion that the judgment ought to be reversed.

By the whole court: Judgment reversed.

THAT AN INVALID OR DEFECTIVE TITLE, if believed to be good, is equally operative with a valid one to give effect to an adverse possession under it, is held, following the doctrine of the foregoing decision, in *Clapp v. Bro. magham*, 9 Cow. 557. So held as to a deed void on its face, and for want of title in the grantor, in *Bradstreet v. Huntington*, 5 Pet. 446; and in *Humbert v. Trinity Church*, 24 Wend. 611, per Cowen, J., both referring to *La Frombois v. Jackson* as authoritative on this point. In the latter case, Cowen, J., declared that the principle would apply wherever title was actually claimed under such deed, even though the claim was not honestly made. The principal case is relied on, also, as authority for the position that a void deed may be a good basis for an adverse possession, in *Miller v. Garlock*, 8 Barb. 156; *Suñol v. Hepburn*, 1 Cal. 290, per Hastings, C. J., dissenting, and *Woodworth v. Fulton*, Id. 319, in the dissenting opinion of the same learned judge. On the other hand Rhodes, J., delivering the opinion of the court, in *Bernal v. Gleim*, 33 Cal. 676, refers to *La Frombois v. Jackson*, among other cases, as holding that "an absolute nullity, as a void deed, judgment, etc., will not constitute color of title."

POSSESSION MUST BE UNDER CLAIM OF TITLE.—That there must be an intent to hold and claim title to the land, to constitute an adverse possession, is held on the authority of *La Frombois v. Jackson*, in *Miller v. Platt*, 5 Duer, 277; *Bowie v. Brahe*, 3 Id. 40, per Bosworth, J. Mere possession without claim of title, however long continued, is not sufficient: *People v. Fields*, 1 Lans. 243. But possession under a claim of title, either with or without a valid deed, is adverse: *Bogardus v. Trinity Church*, 4 Sandf. Ch. 739. Possession and the *quo animo* are the only tests: *Bradstreet v. Clarke*, 12 Wend. 674; *Bunce v. Gallagher*, 5 Blatch. 491. Bringing an action of ejectment is not such an assertion of title as to give color to a subsequent possession: *Jackson v. Hill*, 5 Wend. 534.

BOA FIDES.—It was held in *Livingston v. Peru Iron Co.*, 9 Wend. 578, citing the principal case, that to constitute a good adverse possession there must be a *bona fide* entry and belief that the title under which the land is claimed is valid. But this is contrary apparently to what is said by Cowen,

J., in *Humbert v. Trinity Church*, 24 Wend. 611. In *Poor v. Horton*, 15 Barb. 491, the principal case is recognized as authority, and it is held that all that is necessary to a valid adverse possession is a holding in good faith under claim and color of title, and exclusive of any other right.

THAT A CONTRACT TO CONVEY is good as color of title, after the vendee has entitled himself to a deed, is held, on the authority of *La Frombois v. Jackson*, in *Briggs v. Prosser*, 14 Wend. 229; and *Stark v. Starr*, 1 Saw. 25. So, it is said in *Vrooman v. Shepherd*, 14 Barb. 454, that possession under an executory contract is adverse as to strangers. But see *Jackson v. Johnson*, 15 Am. Dec. 433. In *Nieto v. Carpenter*, 21 Cal. 490, this doctrine that an executory contract which may be enforced in equity may be good as color of title, as held in the principal case, is referred to as an exception to the general rule that an instrument must at least purport to be an actual conveyance of the title, in order to be a foundation for an adverse possession.

ADVERSE POSSESSION AGAINST THE PEOPLE.—On this point the authority of the principal case is recognized in *People v. Mayor, etc., of New York*, 28 Barb. 253; S. C., 8 Abb. Pr. 24; and *People v. Van Rensselaer*, 9 N. Y. 343.

AS TO NECESSITY OF COLOR OF TITLE to support an adverse possession, see the note to *Ferguson v. Kennedy*, 14 Am. Dec. 764.

WHAT IS COLOR OF TITLE.—This subject is discussed in the note to *Tate v. Southard*, 14 Am. Dec. 580. As to the effect of an unregistered deed as color of title, see *Campbell v. McArthur*, 11 Am. Dec. 733, and note.

STATUTE OF LIMITATIONS IS A STATUTE OF REPOSE.—So held, referring to the principal case as authority, in *Sheldon v. Adams*, 41 Barb. 57; S. C., 18 Abb. Pr. 407; 17 How. Pr. 67.

THAT THE COURT CAN NOT LOOK OUT OF A SPECIAL VERDICT for the facts of a case is a principle which is approved in *Williams v. Willis*, 7 Abb. Pr. 91.

CASES
IN THE
SUPREME COURT
OF
NEW YORK.

VAN BEUREN v. WILSON.

[9 COWEN, 158.]

SEAMEN'S WAGES ARE NOT RECOVERABLE IF NO FREIGHT is earned, where the failure is not due to the fault of the master or owners.

LOSS OF FREIGHT THROUGH THE MASTER'S OR OWNER'S FAULT OR FRAUD, as where the ship is seized for a debt of the owners, or is captured and condemned for a violation of neutrality laws, occasions no loss of wages.

LOSS OF FREIGHT BY A DISASTER OR PERIL ARISING FROM ACCIDENT, or superior force, carries with it the loss of the seaman's wages.

THAT FREIGHT WAS LOST WITHOUT THE SEAMEN'S FAULT is not enough to entitle them to wages, if there was no fraud or fault on the part of the master or owners.

CIVIL PROCESS ISSUED AGAINST A VESSEL in a foreign country to try a private right of property therein is not such superior force as to deprive the seamen of their right to wages, though it may break up the voyage, and prevent the earning of freight; for it is the owners' duty to furnish the master with the means of procuring the liberation of the vessel in every such case by giving security.

UNFOUNDED CLAIMS AND LAW SUITS constitute a peril, the consequences of which should fall exclusively upon the owners.

DAMAGES FOR LOSS OF WAGES for the return voyage, may be recovered where the ship, being unseaworthy, is abandoned to the insurers in a foreign country, though wages *eo nomine* would not be recoverable.

SEAMAN CAN NOT SUE OWNERS FOR WAGES under the Act of Congress of February 28, 1803.

CERTIORARI to the marine court of the city of New York. The defendant in error, as plaintiff below, sued the plaintiffs in error, who were defendants below, in assumpsit for wages as a seaman on board a certain brig of which the defendants were owners; also, for damages for discharging the plaintiff in a

foreign port against his will; also, for work and labor, and for money paid, etc.; also, for two months' wages under the statute for being discharged in a foreign port on a sale of the vessel. Pleas, the general issue, and payment with notice of special matter in defense. It was admitted that the plaintiff shipped as cook on the brig in question for a voyage from New York to Newry, in Ireland, thence to another port, and thence to a port of discharge in the United States. The facts in relation to the discharge of the crew at Newry, and the breaking up of the voyage, are stated in the opinion. The freight earned on the voyage out was one thousand and eight hundred dollars, which, together with the value of the vessel, was consumed in expenses at Newry. It was admitted also that if anything was due to the plaintiff as wages, damages, compensation, or allowance for his services and for his discharge in Newry, it was the sum of forty-five dollars, and for that sum, together with costs, the court below gave judgment for the plaintiff.

D. Lord, jun., for the plaintiffs in error. The plaintiff below could not recover wages against the owners under the act of February 28, 1803: *Ogden v. Orr*, 12 Johns. 143. Freight is the mother of wages, and where, from failure of the voyage, no freight is earned, no wages are due: *Abb. on Ship.* part 4, c. 3, sec. 1; *Dunnell v. Tbmhagen*, 3 Johns. 154; *Icard v. Gould*, 11 Id. 279; *Wetmore v. Henshaw*, 12 Id. 324, where Thompson, J., discusses at length the law of seamen's wages. The rule often operates in the seaman's favor, as where he is sick, and unable to do duty when his wages are still paid him. So, where he is captured, and the vessel is navigated by a new crew and earns wages: *Wetmore v. Henshaw*, 12 Johns. 324; *Girard v. Ware*, 1 Pet. C. C. 142. So, during a long embargo where freight is ultimately earned: *Beale v. Thompson*, 4 East, 546. It is just, therefore, that the rule should be enforced when it operates against him, as where no freight is earned, owing to the capture of the ship, or its seizure in a foreign country, or to its becoming unseaworthy during the voyage, without the fault of the master or owners, or to any other like cause: *Porter v. Andrews*, 9 Johns. 350; *Hindman v. Shaw*, 2 Pet. Adm. Dec. 264; *Oxnard v. Dean*, 10 Mass. 143. In this case the owners lost, not only the freight, but the ship, without any fault of their own or of the master, and the crew should lose their wages.

I. Clizbe, contra. The case of *Woolf v. Brig Oder*, 1 Pet.

Adm. Dec. 261, was very similar to this. There the vessel was seized in a foreign port for the owner's debts, and the claim for wages was allowed. It is a maxim in law that where one of two innocent persons must suffer by the act of another, the loss ought rather to fall on him who enabled such other to occasion the loss: *Lickbarrow v. Mason*, 2 T. R. 70. Here the defendants below gave occasion for the act which caused the loss; for the claim on which the vessel was libeled, if it had any foundation, must have originated in some act or neglect of theirs. They should have known that the title of their vessel was clear and unimpeachable before they contracted with the plaintiff. The plaintiff, at all events, could have had no agency whatever in causing the seizure of the vessel, and ought not to be made to suffer for it. There was nothing in this case analogous to the *vis major*, or inevitable necessity, or peril of the sea, which the seamen could be expected to have taken into view in making their contract, and which, it is admitted, would occasion a loss of their wages. If the claim under which the vessel was seized was wholly without foundation, there was still no such equality of situation between the plaintiff and the defendants as should cause the plaintiff to lose his wages. In that case, the libellant, and those concerned with him, were trespassers, and liable as such to the owners for all damages occasioned by the seizure, including the damages of the seamen, while the latter could only look to the owners for reparation. The subsequent condemnation and abandonment of the vessel as unseaworthy cut no figure in the case, for the plaintiff's right of action accrued on his previous discharge. It is only where a loss of freight is occasioned by a disaster, such as loss or capture, that seamen lose their wages: *Hoyt v. Wildfire*, 3 Johns. 520.

By Court, SUTHERLAND, J. No general principle of commercial law is better settled than that no wages are allowed to seamen where no freight is earned, unless the loss of the voyage and freight is to be imputed to the default of the master or owners. It has, accordingly, grown into a legal maxim, that freight is the mother of wages: *Abbott on Ship*. pt. 4, ch. 3, and cases there collected; 3 Johns. 154; 11 Id. 279; *Wetmore v. Henshaw*, 12 Id. 324.¹ In the last case, this question is elaborately discussed by the counsel and by the judge who delivered the opinion of the court; see, also, 9 Johns. 350; 1 Peters' Adm. Rep. 142; 2 Id. 264; 10 Mass. 143. The rule is founded on

1. *Wetmore v. Henshaw*, 12 Johns. 324.

considerations of policy growing out of the peculiar nature of the service, and is intended to give to seamen the strongest inducements to exert themselves to the utmost for the safety and preservation of the ship: 1 Sid. 179.

The rule being admitted, the question in this case is, whether the loss of the return voyage, and consequently of the freight, was owing to the default or misconduct of the owners or master of the vessel.

The vessel, after the discharge of her cargo at Newry, was regularly libeled in the Irish admiralty court, in March, 1824, by one Forrest, who claimed to be the owner; and the captain and crew were turned ashore by the proctor of the court. The captain provided for the crew until the twenty-seventh of April, when he paid them their wages to that time, and discharged them. The vessel was detained in the custody of the admiralty until October, 1825, when, by the decree of that court, she was ordered to be restored to the captain and owners; which was prevented by a mob, and the captain was killed in the affray. The vessel had then deteriorated so much as not to be worth repairing. The owners abandoned to the underwriters; the vessel was sold in Ireland, and never returned to this country. The voyage, of course, was broken up, and no return freight earned.

In *Woolf and others v. Brig Oder*, 2 Peters' Adm. Rep. 261, the vessel was seized in a foreign port for the debt of the owner, and the seamen were discharged. They were held to be entitled to their wages. This was, doubtless, on the well-settled ground that the seizure was attributable to the fault of the owner: 2 Bro. Adm. 182; Vin. Abr. Mariners (E.), pl. 7; Mal. Lex Merc. 105, c. 23; Mol. B. 2, c. 3, sec. 7.

So in *Hoyt v. Wildfire*, 3 Johns. 520, the seamen were shipped on a voyage from New York to Bombay. The master deviated from his course, and sailed towards the Isle of France, under the pretense of being in want of water; and while thus sailing, was captured by an English frigate, and the vessel and cargo were condemned. It appeared that the want of water was a mere pretense; and the court say: "The act of the master, in sailing to the Isle of France, with articles contraband of war, under pretense of a want of water, was a fraudulent act, and from the testimony in the case, there is every reason to conclude that this was the original destination of the ship, known to the owner, though concealed from the seamen. The contract entered into with the seamen was not kept with good faith. A de-

ceit was practiced upon them. The ship and freight were justly lost by a willful violation of neutral duty, and the seamen had the soundest claim upon the owner for an equitable compensation." And the general rule is there repeated, that if freight be lost during the course of a voyage, by a disaster or peril, arising from accident or superior force, the seamen lose their wages; but, if the freight be lost by the fraud or other wrongful act of the master, the reason of the rule does not apply. It is not sufficient that the freight be lost without the fault of the seamen. The capture or wreck of the vessel may be without their fault. It must be owing to the fraud or other wrongful act of the master or owner, or else the loss of the freight carries with it the loss of the seamen's wages. The issue of the proceedings in the Irish admiralty court shows that the claim which was preferred against the defendant's vessel, and which caused the breaking up of the voyage, was without foundation. What color there was for it, we have no means of judging, as the result only of the proceedings is stated in this case.

But I am inclined to think that civil process, issuing at the instance of an individual, for the purpose of trying a private right of property, is not that species of superior force which will exempt the owners of the vessel from the payment of seamen's wages, although it may break up the voyage, and prevent the earning of freight. It does not seem to fall within the policy of the rule: *Vide* 1 Sid. 179. Every individual is supposed to know his own title to the property in his possession, and to be capable of taking the legal precautions necessary to prevent that possession from being interrupted; and the law is supposed to award an adequate compensation for the damage which may result from an unfounded prosecution in the costs, and, indeed, express compensation for loss of freight might be given in this instance to the successful party: *Vide* 3 Mason's Rep. 165-6. Besides, there is hardly any civil proceeding which necessarily changes the possession of the property, the title to which is to be tried, until the final termination of the suit. In proceedings *in rem* to enforce a claim of the alleged owner, the defendant can probably retain the possession of the vessel or other property libeled, or, at least, have it restored when the preservation of the property requires it, on giving competent security to return it if finally condemned. The owners of the vessel in question, or the master, might probably, on showing proper cause, and on giving security according to the course of the court, by deposit or otherwise, have retained or

been restored to the possession of the vessel, although libeled, and have prosecuted their voyage without any essential interruption: Clerke's Adm. Practice, tit. 41, 43. It is no answer to this argument to say that it was not, or may not have been, in their power to obtain the requisite security in a foreign land. It is the duty of owners to furnish the masters of their vessels with the means of obtaining all the credit which the exigencies of the voyage may require. But independently of this consideration, the being subjected to unfounded claims and lawsuits is a contingency, the peril and consequences of which, I think, ought to fall exclusively upon the owners. It is a matter of mere private concern, the damages or probability of which the seamen have no means of calculating, and can not, by any effort or exertions on their part, avert. But the perils of the seas, and the danger of capture, they can in some degree estimate, from knowing the destination of the vessel, the length of the voyage, the cargo on board, and the pacific or belligerent state of the maritime powers; and they can not only estimate the danger, and, therefore, exercise a discretion as to the voyages in which they will embark, but they have in their own skill, enterprise, and courage, the means of diminishing, if not entirely averting it. These considerations appear to me to constitute a marked distinction between the two classes of cases.

In *Eaken v. Thom*, 5 Esp. Rep. 4,¹ the voyage was broken up in its progress by the vessel being unseaworthy, without any imputed fault of the owner; and Lord Ellenborough held that though the mate could not recover his wages *eo nomine*, yet he might recover damages in an action on the case. The suit before us was so shaped as to cover not only a claim for wages as such, but damages for omitting to furnish a seaworthy ship, and discharging the plaintiff below in a foreign land. The amount in either view was admitted by the parties to be the same. The plaintiff below, therefore, was entitled to wages, or perhaps more properly speaking in this case, damages to the amount of his wages for the return voyage. The plaintiff below could not sustain his suit under the act of congress of February 28, 1803: Ingersoll's Dig. 146. The case of *Ogden v. Orr*, 11 Johns. 143,² is decisive upon this point.

Judgment affirmed.

NO FREIGHT, NO WAGES.—In *Daniels v. Atlantic Mut. Ins. Co.*, 24 N. Y. 449, the rule above laid down, that seamen are not entitled to wages where there is no freight earned, is approved, but it is held that where a ship is

1. 5 Esp. 6.

2. *Ogden v. Orr*, 11 Johns. 143.

wrecked and abandoned to the insurers, but the sailors save enough of the cargo to yield freight sufficient to pay wages for the voyage, they are entitled thereto.

DUTY OF OWNERS TO FURNISH MEANS OF OBTAINING CREDIT.—In *American Ins. Co. v. Ogden*, 15 Wend. 541, Savage, C. J., remarked that the statement made in the principal case, that it is the duty of the owners of a vessel to furnish the master with the means of obtaining all the credit which the exigencies of the voyage may require, was made *arguendo* and, at least, that the rule did not, as between the insurers and the insured, in a case of abandonment from inability to make repairs, require the owners to give the master any further means of obtaining credit abroad than the control of the vessel would afford. That case was reversed in the court of errors, and Verplanck, senator, approved the rule laid down in the above decision on this point: *American Ins. Co. v. Ogden*, 20 Wend. 237.

THE CONSTRUCTION OF THE ACT OF 1803, adopted in the principal case, seems to be disapproved in *Wells v. Meldrum*, Blatch. & H. 345, where it is held that if a vessel is condemned and sold as unseaworthy while abroad, the seamen are entitled to recover the two months' extra pay allowed by that act in an action against the master.

RUST v. GOTT.

[9 COWEN, 169.]

WAGERS CONTRARY TO PRINCIPLES OF MORALITY or sound policy are not recoverable.

WAGER ON THE RESULT OF AN ELECTION IS ILLEGAL, though made after the election, but before the canvass is completed; because the tendency is to promote inquiry into the legality of elections and thus to excite discontent and possible disturbances among the people.

CERTIFICATE OF ELECTION IS ONLY PRIMA FACIE EVIDENCE, and does not preclude collateral inquiry into the correctness or legality of the canvass.

TROVER for a promissory note drawn by one Luther Marsh and alleged to have been converted by the defendant. Plea, the substance of which is stated in the opinion, to the effect that the note was deposited upon a wager between the said Marsh and the plaintiff upon the result of an election, the defendant being stakeholder, and that the said Marsh had afterwards withdrawn the note. Demurrer and joinder.

N. P. Randall, for the demurrer. Wagers are recoverable except where they tend to immorality, or to a breach of the peace, or to the injury of third persons, or to indecency, or are otherwise contrary to sound policy: *Good v. Elliott*, 3 T. R. 693; *Jones v. Randall*, Cowp. 37; *Dacosta v. Jones*, Id. 729; *Earl of March v. Pigot*, 5 Burr. 2802; *McAllister v. Hayden*, 2 Campb. N. P. 438; *Hussey v. Crickett*, 3 Id. 168; *Pope v. St. Leger*, 1

Salk, 844; *Bunn v. Riker*, 4 Johns. 426 [4 Am. Dec. 292]; *Campbell v. Richardson*, 10 Id. 406. This wager came within none of the exceptions; being on a past election, it could not influence voters as in *Allen v. Hearn*, 1 T. R. 56; *Bunn v. Riker*, 4 Johns. 426 [4 Am. Dec. 292]; *Vischer v. Yates*, 11 Id. 23; and *Denniston v. Cook*, 12 Id. 376; nor did it tend to bring improper matters before the public, as in *Atherford v. Beard*, 2 T. R. 610; and *Tuppenden v. Randall*, 2 Bos. & P. 467. It could not involve any inquiry into the official canvass, which was final and conclusive. The loser had no right to withdraw his bet after knowledge of the result; and if he did not know it, that fact should be averred in the plea, which is always taken most strongly against the pleader: *Yates v. Foot*, 12 Johns. 1; *Smith v. Blackmore*, 4 Taun. 474; *Dunlap's Pr.* 464, and cases cited. The defendant being a mere stakeholder, can not invoke the principle in *pari delicto*, etc.: *Vischer v. Yates*, 11 Johns. 23; *Cotton v. Thurland*, 5 T. R. 405.

J. A. Spencer, contra. The plea is good under the authority of *Lansing v. Lansing*, 8 Johns. 454, which involved a similar wager. Besides, here the bet was made before the canvass by the county board, and such wagers would lead to the exertion of corrupt influence upon the canvassers, or other attempts to tamper with the determination of the result. The reasoning of the majority of the judges in *Bunn v. Riker*, 4 Johns. 426 [4 Am. Dec. 292], decides this case. *Yates v. Foot*, 12 Johns. 1, and *Denniston v. Cook*, Id. 376, recognize the soundness of the principle adopted in *Bunn v. Riker*. It was shown in *Smith v. McMasters*, 2 Browne C. P. (Pennsylvania), 182, that all election bets are illegal and void upon common law principles. In this state, if such wagers were held recoverable, the question of the validity of every election might be carried to the court of errors.

By Court, WOODWORTH, J. This was an action for trover to recover the amount of a promissory note drawn by Luther Marsh in favor of the plaintiff for four hundred and thirty-five dollars, and alleged to have been converted by the defendant. The plea avers, that after the closing of the polls at the election in 1826, and before the event was known, the plaintiff and Marsh made a bet upon the event of the election for governor, they being legal voters; that the note was deposited by Marsh with the defendant, as a stakeholder, upon condition that if De Witt Clinton had been elected governor at the election the note was to be delivered to the plaintiff; that afterwards, and before the

event of the election was generally known, and before the official canvass of the election in the respective counties of the state, Marsh forbade the defendant to deliver over the note to the plaintiff; and demanded that it should be delivered to him, and that in pursuance of such demand, he redelivered the note to Marsh. To this plea there is a demurrer. From the plea, I infer that Marsh, before the demand of his note from the stakeholder, was well satisfied as to the result of the election. The averment is that it was not generally known. Want of knowledge in Marsh is not pretended. This, then, is not the case of a party, who, having made an illegal wager, and deposited the amount with the stakeholder, attempts to avail himself of a *locus penitentiae*, before the event is known, and before there are any reasonable grounds for forming an opinion of the result, and claims his deposit.

It is not necessary here to say whether such a claim could be enforced against the stakeholder, should he refuse to comply; neither is it necessary to give any opinion on the question whether Marsh could, in this case, have sustained an action against the stakeholder, had he refused to deliver up the note.

The question here is between the winner and the stakeholder. The event has taken place; and the stakeholder is entitled to defend himself on the same ground that might be taken by the losing party had the action been against him. Is a wager of this kind recoverable? It is conceded that some wagers form the proper ground of an action, although courts have generally expressed regret that the law has so been settled in any case. There are wagers of a different class, which can not be supported, and among that number may be reckoned such as are contrary to the principles of morality or sound policy: *Jones v. Randall*, and *Da Costa v. Jones*, Cowper, 37, 729.

The wager in this case falls within the latter description; for, although it does not possess one prominent feature which distinguished the case of *Bunn v. Riker*, 4 Johns. 426 (I allude to the fact that the bet was laid on the last day of the election, and one of the parties had not then voted), yet enough remains which the principle of sound policy forbid the court to sanction.

The wager is: That De Witt Clinton had been elected governor. By the act regulating elections: Sess. 45, c. 250, it is declared that all questions that may arise in the canvass, estimate, or calculation of the votes given at any election, shall be decided by the opinion of the majority of persons composing the board, who shall determine conformably to the certified

copies returned by the clerks of counties, the person duly elected, and cause to be delivered a certificate of their determination.

If the question is afterwards to be litigated in a court of law, I apprehend the certificate would only be *prima facie* evidence, and that it would be competent to go into evidence to show that the canvass was not correct, or was illegal. Thus a jury may find that the governor declared to have been elected had not been duly elected; but that another person is the legal governor, by a majority of votes. Such decision would not affect the exercise of the powers of governor by the person holding the certificate; but its manifest tendency would be to excite discontents, and possibly disturbances among the people, to alienate their attachment from an incumbent chosen by a minority, and withhold confidence, so essentially necessary in a government resting on public opinion. We may suppose a case, where it is alleged that a certificate was obtained by bribery. The question being as to the validity of the election of the chief magistrate, evidence might be offered to prove the fact, and thus implicate third persons, not parties to the suit, who may or may not know that any such question is pending. We are, then, called on to decide, whether an idle wager, which might draw into discussion matters of great public interest, the direct tendency of which is to open the door of collusion between different departments of the government, to impair public confidence, and agitate the community, without producing any salutary effect, ought not to be considered as against sound policy. I have no difficulty in answering this question in the affirmative.

The defendant is entitled to judgment on the demurrer.

Judgment for the defendant.

ELECTION WAGERS.—The doctrine here laid down, that a wager on the result of an election, whether made before, during or after the election, is illegal, without the aid of a statute, on grounds of public policy, is approved in *Morgan v. Groff*, 4 Barb. 526; *Brush v. Keeler*, 5 Wend. 250; *Fowler v. Van Surdam*, 1 Denio, 560; *Hill v. Kidd*, 43 Cal. 615, 617. To the same effect, see *Bunn v. Riker*, 4 Am. Dec. 292, and note thereto.

GAMING CONTRACTS GENERALLY.—The subject of actions on wagers is considered in the note to *Downs v. Quarles*, 12 Am. Dec. 339. In that case it is held that money paid on a gaming consideration can not be recovered in equity on the ground merely that it was lost by gaming. A bond given on a gaming consideration is not binding, but if the obligor convey to a *bona fide* assignee of the bond, in accordance with his contract, neither he nor his heirs or representatives can afterwards question the conveyance: *Chiles v. Coleman*,

12 Id. 396. One who sells a horse, and receives in payment a note made by a third person for a gambling debt, of which fact he has notice, may nevertheless recover on the note: *Jones v. Sevier*, 13 Id. 218, and see the note to that case. Money lost at gaming, even by foul play, can not be recovered: *Babcock v. Thompson*, 15 Id. 235.

HYDE v. STONE.

[9 COWEN, 230.]

DISTRIBUTES ARE TENANTS IN COMMON of an intestate's personalty before distribution, and where one takes possession of the whole property, unless it be sold or destroyed by him, trover will not lie against him in favor of a co-tenant.

TENANT IN COMMON CAN NOT SELL his co-tenant's interest, as a partner may, and if he does so it is a conversion.

BY MARRIAGE, A WIFE'S INTEREST AS TENANT IN COMMON of personalty passes to her husband, and constitutes him a tenant in common in her stead.

IN TROVER BY A TENANT IN COMMON of chattels against his co-tenant, where the defendant produces some of the articles, and admits that others have been lost or destroyed, but does not say by him, it is for the jury to determine whether or not there has been a conversion by the defendant, and the amount of the damages and a direction by the court to find a particular sum is erroneous.

VERDICT SUBJECT TO THE OPINION OF THE COURT can not be directed except by consent of parties.

TROVER. Verdict for the plaintiff subject to the opinion of the court upon a case stated. Motion for a new trial. The facts appear from the opinion.

S. Sherwood, for the plaintiff.

J. A. Collier, contra.

By Court, WOODWORTH, J. This was an action of trover. The plaintiff is the only son and heir of Gershom Hyde, who died in 1801, leaving a widow and various articles of personal property. In 1808 the widow married the defendant, and died in 1809. After the marriage, the plaintiff lived with the defendant until the death of his mother, and then departed. The plaintiff was born in September, 1800. The widow had possession of the property until her marriage, when the defendant took possession. It appeared at the trial that in 1814 P. Humphreys, at the request of the plaintiff's guardian, called on the defendant for a settlement. The defendant agreed that he was liable to pay eighty dollars on account of the property, and would give that sum, or let the witness (H.) have any of the

articles he wished. A memorandum of articles was then made and asserted to by the defendant, valued at ninety-five dollars and forty-six cents. This proposition was left with Humphreys for the ratification of the plaintiff's guardian, but nothing was afterwards done. In 1824 the plaintiff made a demand of his interest in the articles. The defendant refused to give up anything, saying that some of the articles were sold and some destroyed. The defendant produced at this time some of the property nearly worn out and worth little. The residue of the articles, the defendant said, were destroyed or sold. The plaintiff's demand was for two thirds of the property. The judge directed the jury to find a verdict for the plaintiff for one hundred and thirty-six dollars, subject to the opinion of the court on a case to be made. To this direction the counsel for the defendant excepted. The jury found for the plaintiff with one hundred and thirty-six dollars damages.

It appears to me this form of action is not adapted to the facts before us. If the defendant had been called to account, a liquidation of the claim might have been made after all proper allowances to the defendant. As that remedy has not been chosen, the question is whether the action of trover has been supported by the proof.

On the death of Gershom Hyde, two thirds of the personal property vested in the plaintiff and one third in the widow. On the marriage, her share passed to the defendant, so that the plaintiff and defendant became tenants in common of the chattels, for the recovery of the value of which this action is brought. Tenants in common of a chattel have an equal right to the possession. The law will not afford an action to the one dispossessed, because his right is not superior to that of the possessor. But tenants in common are not like partners. One of the latter may dispose of their joint chattels by virtue of an applied authority to sell, without being liable as for a tort; while the latter can not dispose of them without violating the right of their cotenants. For a sale, therefore, trover will lie by one tenant in common against another: *Wilson v. Reed*, 3 Johns. 175. As to a portion of the chattels, they remained in the defendant's hands when the demand was made, and they were produced. As to them, the action would not lie. But the defendant said some of the articles were sold and some destroyed. By whom sold or destroyed was not stated. The widow had possession from 1801 to 1808, the time of her marriage. Whether sold and destroyed before her marriage, or subsequently by the defend-

ant; and if sold and destroyed, what portion of them, does not clearly appear.

These were questions proper to be submitted to the jury. They were exclusively within their province. To what extent, if at all, could the defendant be made liable? Upon what ground the judge directed the jury to find a specific sum, when the question of damages was involved in uncertainty, I have not been able to discover. The defendant claimed the right of going to the jury, and excepted to the direction. It seems to me the judge erred in disposing of the cause in this manner, when there were facts to be passed on, and the material evidence from which a conclusion is to be drawn, was not clear and explicit. It is not competent for the judge to direct a verdict subject to the opinion of this court, unless by consent of the parties.

The verdict must be set aside, and a new trial granted, with costs to abide the event.

Rule accordingly.

RECOGNIZED AS AUTHORITY on the following points: That one tenant in common of a chattel can not maintain trover against another for a mere dispossession, but only for a destruction or sale of the property, in *Farr v. Smith*, 9 Wend. 340; *Tyler v. Taylor*, 8 Barb. 588; that a sale of the whole property by one tenant in common, as belonging to himself exclusively, is a conversion, in *White v. Osborn*, 21 Wend. 75; *Tyler v. Taylor*, 8 Barb. 588; *Dyckman v. Valiente*, 42 N. Y. 561; that where personal property held in common is indivisible, and can not be partitioned, there is no way in which one of the tenants in common can have the use of it, if the other, being in possession, refuses to surrender it: *King v. Phillips*, 1 Lana. 429; that a judge has no power, except by consent, to direct a verdict subject to the opinion of the court, although the rule was held not to prohibit the judge from directing a verdict for the plaintiff on a *prima facie* case, where there was a total failure of proof on the part of the defendant, in *People v. Cook*, 8 N. Y. 76.

On a second trial of the case of *Hyde v. Stone*, there was a verdict for the plaintiff, which was approved by the supreme court, and the doctrines laid down in the foregoing opinion were reiterated: *Hyde v. Stone*, 7 Wend. 354.

As to actions against cotenants for negligence occasioning the destruction of the common property, see *Chesley v. Thomson*, 14 Am. Dec. 324; *Ralston v. Barclay*, 12 Id. 485, and note. That co-heirs are tenants in common, see *Malcolm v. Rogers*, 15 Am. Dec. 464.

WHITBECK v. WHITBECK.

[9 COWEN, 266.]

AGREEMENT TO PURCHASE LAND WITH PAYMENT of the purchase-money gives an equitable title, which a court of chancery will enforce.

SALE OF AN EQUITABLE TITLE is a good consideration for a promise.

CONVEYANCE BY A THIRD PERSON IS A GOOD CONSIDERATION for a promise by the grantee to pay for the land where the conveyance is made at the instance and for the benefit of the promisee.

WRITTEN PROMISE UNNECESSARY, WHEN.—A promise to pay for land actually conveyed need not be in writing.

ASSUMPTION OF ANOTHER'S DEBT, WHEN BINDING.—Where a vendee of land, having promised to pay for the same, conveys to another who assumes the debt, and subsequently makes a verbal promise to the creditor to pay it, this is not a promise to pay another's debt, and the promisee can maintain an action thereon.

RULE THAT A DEED CAN NOT BE CONTRADICTED BY PAROL applies only between parties and privies.

ACKNOWLEDGMENT OF CONSIDERATION OF A DEED may be contradicted by parol even by the parties to it.

NEW TRIAL ON THE GROUND OF NEWLY-DISCOVERED EVIDENCE will not be granted where the evidence is cumulative.

ASSUMPSIT, the declaration containing the common money counts; also, a count for certain premises sold by the plaintiff to defendant at his request; also, a count for goods sold, and on an account stated. The plaintiff furnished a bill of particulars stating a balance due H. Whitbeck, the plaintiff, from John I. Whitbeck, the defendant, of six hundred and forty-eight dollars and fourteen cents on a settlement made October 31, 1822, for purchase-money remaining due on a farm sold by the plaintiff to the defendant's father, and afterwards conveyed by the latter to the defendant. The facts are stated in the opinion. Verdict for the plaintiff, and a motion for a new trial.

A. L. Jordan, for the motion.

J. A. Collier, *contra*.

By Court, **SUTHERLAND, J.** The evidence of Lawrence P. Whitbeck clearly establishes the fact of a settlement made between the plaintiff and the defendant, on the thirty-first day of October, 1822, and that the balance of six hundred and forty-eight dollars and fourteen cents was then found due to the plaintiff, which the defendant, John I. Whitbeck, then expressly promised to pay. This settlement related to the balance due the plaintiff, for the farm of which the defendant was then in possession, which the plaintiff had previously owned, and upon which he had given a mortgage to John Whitbeck, junior, the father of the defendant; and the balance which the defendant promised to pay was the value of the farm as agreed upon by the parties, over and above the mortgage. The judge charged the jury, that if they believed such promise was made, the plaintiff was entitled to recover. Their verdict establishes

the fact of the making of the promise, and is in entire accordance with the evidence.

The only important question, then, is, whether that promise was binding in law, as being without the statute of frauds, and whether it is supported by a good consideration.

John Whitbeck, the father of the defendant, had a mortgage upon the farm of the plaintiff. Subsequent to the giving of that mortgage, and in 1816, Peter Whitbeck obtained a judgment against the plaintiff, upon which his farm was sold, and purchased in by Peter, the plaintiff in the judgment, who received a deed for it from the sheriff. The plaintiff subsequently paid Peter the amount of his judgment, so that all his claims upon the farm were entirely satisfied. In this stage of the business, John Whitbeck, the mortgagee, and the defendant, agreed to purchase the farm from the plaintiff. It was valued at one thousand eight hundred dollars, and they were to deduct from that sum the amount of the mortgage, and pay the plaintiff the balance. The defendant accordingly moved on to the farm in 1820, the plaintiff moving off at the same time. The settlement in 1822 consisted in casting the interest on the mortgage, and ascertaining the balance over and above it.

Peter Whitbeck, who held the sheriff's deed, was present at the settlement, and told the defendant and his father if they did not do what was right with the plaintiff he would not assign the sheriff's deed, or convey the farm to them. In 1823 or 1824, Peter Whitbeck conveyed the farm to John Whitbeck, by an instrument in writing, sealed and indorsed on the back of the sheriff's deed to him, expressing a consideration of ten dollars paid. This conveyance or assignment bears date in 1820, but is proved to have been made in 1823 or 1824. John Whitbeck conveyed his interest in the farm to his son, the defendant, in 1820, about the time when he took possession of it, as it would seem by way of gift or advancement; and at the time of the settlement said, that as he had given John I. the farm, he must or ought to pay the plaintiff's claims upon it; and the subsequent promise of the defendant to pay, shows that he admitted the propriety and justice of the arrangement.

I am inclined to think the plaintiff had an equitable title to or interest in the farm in question, which was a good consideration for the promise of the defendant. It will be recollected that the plaintiff had actually paid Peter Whitbeck the amount of his judgment prior to the settlement with the defendant, upon the understanding or agreement that Peter, who had the

legal title to the farm, should hold it for the benefit and subject to the control of the plaintiff. This created a trust which I apprehend might have been enforced in a court of equity. It was in effect a repurchase of the farm by the plaintiff by a parol agreement and the consideration money paid. The case of *Jackson ex dem. Seelye v. Morse*, 16 Johns. 197 [8 Am. Dec. 306], shows that although the purchaser, under such circumstances, does not become seised at law; still he acquires an equitable interest, which a court of chancery will protect and enforce, by a decree for the specific performance of the contract. The conveyance, then, from Peter to John Whitbeck must be deemed to be made at the instance and for the benefit of the plaintiff, and would unquestionably have been a good consideration for a promise on the part of the grantee to pay the price or consideration money to the plaintiff. The promise to pay for land actually conveyed need not be in writing: 20 Johns. 340. John I. Whitbeck, the defendant, having succeeded to all the rights and interest of his father in the premises, by a conveyance from him, upon the understanding or agreement, as the evidence warrants the belief, that he should satisfy the claim of the plaintiff, his express promise to the plaintiff to pay, is clearly founded on a good consideration, and is not within the statute of frauds. It is not a promise to pay the debt of another. By the contract between him and his father he had made the debt his own. Upon a consideration moving from the father to him, he promised to pay a third person to whom the father was indebted. Here is an entirely new consideration for the promise, which makes it in effect and in judgment of law a debt of the son.

This case is clearly distinguishable from that of *Van Alstine v. Wimple*, 5 Cowen, 162. There, when the contract was made with Wimple, Van Alstine had no interest, either legal or equitable, in the land.

He had not repaid the purchase-money to Olcott, who purchased under the execution. Olcott verbally agreed to relinquish his purchase to Wimple, and Wimple agreed to pay Van Alstine six hundred dollars for the land. If Olcott had refused to carry this agreement into effect, he could never have been compelled to perform it; it was an agreement in relation to land, and therefore void; and it was, as to him, entirely without consideration.

The parol evidence, to show the true consideration of the deed, or assignment, from Peter to John Whitbeck, was prop-

erly received. The plaintiff was not a party, nor in strictness, I apprehend, a privy to that conveyance; and the rule which prohibits the contradiction by parol of what is expressed in a deed, even if applicable to the consideration, I understand, is confined to the parties or privies to the deed. The rule is founded on the principle that a party is estopped from impeaching or contradicting his own deed. But the rule does not apply to the acknowledgment or consideration paid in a deed, even as between the parties: *Shephard v. Little*, 14 Johns. 210; *Bowen v. Bell*, 20 Id. 338 [11 Am. Dec. 286].

I see no error in the charge of the judge. The only question of fact was, whether the defendant made the promise relied upon. If he did, it was a question of law, whether, under all the circumstances of the case, the promise was binding. There is nothing in the ground of newly discovered evidence. It is strictly cumulative upon one of the principal points in controversy upon the first trial.

Motion for a new trial denied.

ACKNOWLEDGMENT OF CONSIDERATION IN DEED NOT CONCLUSIVE.—That the consideration clause in a deed is not conclusive, even upon the parties to the instrument, but, like an ordinary receipt, may be explained or contradicted by parol evidence, showing that the consideration was different, greater, or less, than stated, or that no consideration at all was received, has been frequently held on the authority of the foregoing case: *Rapelye v. Anderson*, 4 Hill, 487; *Frink v. Green*, 5 Barb. 457; *Stackpole v. Robbins*, 47 Barb. 219; *Walcott v. Ronalds*, 2 Rob. 620; *Taggart v. Stanbery*, 2 McLean, 546. See, also, on the same point: *Schemerhorn v. Vanderheyden*, 3 Am. Dec. 306, and note thereto; *Chiles v. Coleman*, 12 Id. 396, and other cases in the American Decisions referred to in the note to that case: *Harrison v. Laverty*, 13 Id. 283, and note. And as to the acknowledgment of receipt of the consideration in an agreement for the conveyance of land, see *Watson v. Blaine*, 14 Am. Dec. 669, and note. Concerning the effect of a recital of consideration in a deed as evidence, see *Breckenridge v. Todd*, 16 Am. Dec. 83.

That strangers may, in order to prevent the fraudulent operation of an instrument upon their rights, show, by parol, the true character of the transaction where parties or privies would be estopped by the instrument, is held on the authority of the principal case, in *Taylor v. Baldwin*, 10 Barb. 587. And generally where a written agreement concludes parties and privies, but not strangers, is held, citing *Whitbeck v. Whitbeck* as authority, in *Earle v. Crane*, 6 Duer, 572.

CASES
IN THE
COURT FOR THE TRIAL OF IMPEACHMENTS AND THE
CORRECTION OF ERRORS
OF
NEW YORK.

BAKER v. STACKPOOLE.

[9 COWEN, 420.]

ADMISSION BY A PARTNER, AFTER DISSOLUTION, either of an account or of a fact, is not competent evidence, in this state, against his copartner.

SUCH ADMISSION IS COMPETENT EVIDENCE IN ENGLAND and in some of the states, with respect to joint contracts made during the partnership.

APPLICATION OF PAYMENTS.—A person indebted to another on different demands, upon making a payment may apply it to any demand he pleases; if he fails to do so, the creditor may appropriate the payment as he pleases.

WHERE THE PARTIES DO NOT APPROPRIATE A PAYMENT, the law makes the appropriation, according to certain presumptions.

PAYMENT BY PARTNER, APPLICATION OF.—A creditor, having a demand against a firm, and a later demand against one of the partners, upon receiving an unappropriated payment from such partner, may, it seems, apply it first to the partner's individual debt; but the residue, at least, must be appropriated upon the firm debt, and can not be retained and applied on future demands against such partner.

CREDITOR CAN NOT RETAIN PAYMENT TO APPLY ON FUTURE DEMANDS, leaving a prior debt unpaid.

APPEAL from the court of chancery. The respondent, who was the complainant below, filed his bill against Baker and Kauffman, who were the defendants below, for an account, and claiming that there was due him from them the sum of five thousand dollars, in respect of certain dealings and transactions set forth in the bill. The defendants answered separately. A reference was made to a master to take and state the accounts between the parties. On the coming in of the report the complainant excepted thereto; and the exception was allowed and a final decree was made against the defendants, from which

Baker alone appealed. The facts material to this appeal, and the substance of the master's report, and of the decree of the chancellor, so far as necessary to the determination of the questions arising on the appeal, are stated in the opinion of the chief justice.

D. Selden, for the appellant.

R. Emmet, contra.

SAVAGE, C. J. The principal questions arising in this case are:

1. Whether the admissions of one partner, after the dissolution of the partnership, are evidence against the other late partner;

2. When one partner retires, leaving a balance due a third person, and the remaining partner continues to make payments to such third person enough to discharge the balance against the late firm, but without any specific appropriation by any one, the payments being made and received on account generally, whether such payments do not discharge the balance against the firm. I shall state only such facts as appear necessary to raise these questions.

On the sixteenth of August, 1817, the respondent and one of the defendants below, Kauffman, purchased the brig William Henry, and the respondent went in her as master on a voyage to Havre. After the departure of the brig, and before her return, the defendants below, Kauffman and Baker, entered into partnership in mercantile business. In January, 1818, the brig made her second voyage to Havre, and her earnings were invested in certain articles for the defendant below. The earnings of the brig, in this way, came into their hands, though Baker, the appellant, seems to have no permanent interest in the brig herself.

In June, 1818, a proposition was made to the defendant, Kauffman, by the agent of Opperman, Mandrott & Co., of Havre, to purchase a quantity of cotton at Savannah, and send it by the brig to Havre, consigned to Opperman, Mandrott & Co. Kauffman proposed to the respondent to be interested in the cotton, which was assented to; but the extent of that interest is disputed; the defendants below contending that the respondent was half owner of one hundred and twenty-nine bales, one third of the cargo, and the respondent contending that his interest was only the amount of funds which he then had in the hands of the defendants below, a little rising one thousand three hundred dollars. On this speculation there was

a loss eventually, as Kauffman says, of five thousand two hundred dollars and upwards. Of course, if the respondent was owner of one half, his loss must have been two thousand six hundred dollars, double the amount which he claims to have been invested. If his investment was but one thousand three hundred and forty-one dollars, as computed by the master, then, by the same calculation, there were proceeds of the cotton in the hands of the defendants below amounting to seven hundred and ninety-one dollars.

In January or February, 1819, Kauffman and Baker dissolved their partnership; Baker retiring with a gross sum, and Kauffman carrying on the business, with authority from Baker to liquidate and settle all unsettled concerns of the company. In the same month of February, 1819, the respondent went in the brig to Limerick, and brought home passengers. He received the freight out and the passage money back, amounting, by the master's report, to three thousand and eighty-six dollars and thirty-five cents, the one half of which belonged to him, and the other half, one thousand five hundred and forty-three dollars and seventeen cents, is credited by the master to Kauffman. When this voyage commenced, according to the master's calculation, Kauffman owed the respondent, on account of the third voyage to Havre, one thousand two hundred and fifty-six dollars and twenty cents, of which eight hundred and twenty-eight dollars and five cents were the proceeds of the cotton and interest. But in consequence of the other charges against Kauffman, growing out of the Limerick voyage, when the respondent received the sum of three thousand and eighty-six dollars and thirty-five cents, after crediting one half to Kauffman he was still debtor to the respondent about one hundred and forty dollars.

The principal controversy between the respondent and Kauffman grows out of the subsequent transactions in relation to the brig; but as Baker was in no wise connected with those transactions, and as he alone appeals, I shall not pursue them farther. The cause having been put at issue, a reference was made to a master to take and state an account between the parties.

On the hearing before the master much testimony was taken; but I find nothing to prove the extent of the respondent's interest in the cotton. From the testimony of Brown and Baker, it appears to have been the subject of dispute between the respondent and Baker. The latter does not admit the claim of the former; but insists that his, the respondent's interest, was

one half. It is evident from the report, that the master did not rely on the testimony to ascertain the fact. He says: "That it has been admitted before me on the part of the said defendant, Kauffman, that the interest of the complainant in a certain parcel of cotton, shipped from Savannah on board the said brig William Henry on her third voyage to Havre, was to the amount of his funds then in the hands of the defendants." This fact had been averred by the respondent in his bill: it was denied by both the defendants below, in their answer, and was, therefore, a fact to be proved. The admission of Kauffman was no doubt conclusive as to him; but did it prove the fact as against Baker? Kauffman and Baker were partners when the purchase was made of one hundred and twenty-nine bales of cotton; and also when the cotton was sold. It seems they were jointly interested in the cotton; but the partnership ended in February, 1819; and the admission was made by Kauffman in 1823. From the manner in which the case was considered by the master, it did not become necessary for him to discuss or decide upon the admissibility of such evidence as against Baker. His conclusion was: that no partnership existed at any time between the respondent and Baker, but if a partnership did exist it could bind Baker only for responsibilities incurred prior to the dissolution, and that by the receipt of the freight and passage money on the voyage to Limerick the sum then due to the respondent on account of former voyages was discharged; and further, that Baker was not answerable for the proceeds of the cotton, they having been received by Kauffman after the dissolution of his partnership with Baker.

The respondent excepted because the proceeds of the cotton were charged to Kauffman alone, when they should have been charged to the defendants jointly.

The exception was allowed by the chancellor, who decreed that Kauffman and Baker should pay to the respondent one thousand one hundred and twenty-four dollars and four cents, the proceeds of the cotton and interest, and that Kauffman alone should pay one thousand and fifty-six dollars and seventy-five cents, with costs against both defendants.

1. Were the admissions of one partner, after the dissolution, proof against the other partner as to the extent of the respondent's interest in the cotton adventure? On this question a different rule prevails in the courts of this state from the one which seems to be established in England. There the rule is, that an admission made by one of two partners, after the disso-

lution of the partnership, concerning joint contracts that took place during the partnership, is competent evidence to charge the other partner. In the case of *Wood v. Braddick*, 1 Taun. 104, a letter of one defendant, a former partner, was produced, written after the dissolution of the partnership, acknowledging a balance due the plaintiff; and it was held conclusive against the other partner. Chief Justice Mansfield says: Clearly the admission of one partner, made after the partnership has ceased, is not evidence to charge the other in any transaction which has occurred since their separation; but the power of partners with respect to rights created, pending the partnership, remains after the dissolution. The same rule prevails in South Carolina: 2 Bay, 533.

In the same year with *Wood v. Braddick*, in the common pleas in England, the case of *Hackley v. Patrick*, 3 Johns. 536, was decided by the supreme court of this state. In that case a partnership had existed between Patrick and Henry Hastie, the latter of whom, on the dissolution, was authorized to settle the unsettled business of the firm. Two or three years after the dissolution, he acknowledged a balance due the plaintiff. Upon this admission the plaintiff sought to recover against Patrick. On the argument, the court stopped the counsel in reply, and said this is a clear case. After a dissolution of a copartnership, the power of one partner to bind the others wholly ceases. There is no reason why his acknowledgment of an account should bind his copartners, any more than his giving a promissory note in the name of the firm, or any other act. Ten years afterwards the point was again raised before the same court, in *Walden v. Sherburne*, 15 Johns. 424. In that case *Wood v. Braddick* was cited and presented to the court as containing the true principle; but Spencer, Justice, in giving the opinion of the court, says; "According to the decision of this court, in *Hackley v. Patrick*, 3 Johns. 536, one partner can not, after a dissolution, bind his copartner by acknowledging an account, any more than he can give a promissory note to bind him. It seems that the court of common pleas in England have held otherwise: 1 Tann. 104; but I believe there is more safety in the rule of this court than in a contrary one. For about twenty years the rule has been considered settled as laid down in *Hackley v. Patrick*, and has been very recently recognized by the supreme court: *Hopkins v. Banks*, 7 Cowen, 650. I would not, therefore, unsettle it, even if I thought the English rule the more correct.

A distinction was attempted upon the argument, between the admission of an account and the admission of a fact; but I can perceive none in principle. The same consequence follows. The admission of the fact determines the amount of liability which attaches to the other partner, with as much certainty as if Kauffman had admitted the amount of the proceeds of the cotton in the hands of the firm.

If, therefore, the court below erred, as I think it did, in considering the fact proved as against Baker by the admission of Kauffman, it follows that the case must be sent back to that court, with instructions to refer it again to the master, unless upon the other point in the case such reference becomes unnecessary.

2. I proceed, therefore, to inquire whether the respondent's claim for the proceeds of the cotton was extinguished by the moneys received at Limerick. In discussing this point, I must necessarily consider the evidence sufficient to charge Baker with the proceeds of the cotton, though I have endeavored to show that that fact has not been proved by competent testimony, so far as regards Baker.

For the purpose of the argument, then, I am to consider the proceeds of the cotton, eight hundred and twenty-eight dollars and five cents, in the hands of Kauffman and Baker, before the commencement of the voyage to Limerick. At Limerick, the respondent received money of the defendant Kauffman, amounting to one thousand five hundred and fifty-seven dollars and sixty cents. Nothing was done at the time which amounted to an appropriation of the money to any particular demand. The respondent had, in fact, a demand for the cotton, and no other, except disbursements by him, on account of that voyage. There is no doubt but a person indebted to the same creditor, on different accounts or demands, making a payment, may apply the payment to any demand he pleases, and if the debtor fails to make the application, or rather appropriation, the creditor may make such appropriations as he pleases. But if no appropriation is made by either, but the money is paid and received generally on account, how does the law make the appropriation? In *Goddard v. Cox*, 2 Str. 1194, it was decided that in such case the creditor has the right of applying when there is no dispute about liability; but if the debtor is liable in one demand personally, and in another as executor, which depended upon the question of assets, then the creditor can not make the application to such demands. The case of *Devaynes*

v. *Noble*, *Clayton's case*, 1 Mer. 584-610, gave rise to much discussion as to the rules governing the application of indefinite payment. Sir William Grant, a master of the rolls, examined the subject at some length, but his decision did not rest upon it, as he distinguished the case before him from all the cases which had been cited. He considered the rule of the civil law to be, that the election, whether by debtor or creditor, should be made at the time of payment; and if neither applied the payment when made, then the law made the payment upon certain rules of presumption; and in applying presumption, the presumable intention of the debtor was first considered. The master of the rolls considered the case of *Goddard v. Cox*, 2 Str. 1194, and the cases of *Wilkinson v. Sterne*, 9 Mod. 427; *Newmarch v. Clay*, 14 East, 239, and *Peters v. Anderson*, 5 Taun. 506,¹ as establishing this proposition, that in the absence of any express appropriation, it is the presumed intention of the creditor which is to govern; and he may, at any time, elect how payments made shall retrospectively receive their application. While he admits the rule thus established by those cases, he considers it an extension of the original rule: *Meggot v. Mills*, Ld. Raym. 287, and *Dawe v. Holdsworth*, Peake's N. P. Cas. 64, were decided apparently upon the original rule of the civil law; but they are said by Chief Justice Gibbs to be distinguishable on the ground that the defendant would have been liable to be declared a bankrupt, unless the payment had been appropriated to the prior debt. *Clayton's case* was decided on the ground of there being no distinct demands in his favor against the banking-house, but one continued running account, and in that case the drafts were held to apply to the oldest deposits. But this case is distinguishable from that. Here the respondent had distinct demands against different individuals, and when a payment was received by him, or moneys of Kauffman came into his hands, he might have good reasons for applying such money to a recent indebtedness of Kauffman alone, and retaining his claim upon the firm for what was due upon the cotton adventure. It will be seen, however, that the moneys received at Limerick were sufficient to discharge his individual claims upon Kauffman, and the joint claims upon Kauffman and Baker also, except one hundred and forty dollars. No case has been cited, and, I presume, none can be found, carrying the creditor's rights so far as to retain money in his hands to apply upon any future indebtedness, leaving a prior demand unpaid. The moneys re-

1. *Peters v. Anderson*, 5 Taun. 506.

ceived by the respondent, therefore, should be applied to pay, as far as they went, all the claims he had, giving him the election in the appropriation. According to this rule, if we consider the liability of Baker established by the admission of Kauffman, still the decree against both defendants is for too much.

Whether, therefore, Baker is liable or not, the decree of his honor, the chancellor, should be reversed, and the cause sent back to the master for further proof.

WOODWORTH, J., and the whole court concurred in this opinion, except

SUTHERLAND, J., who, not having heard the argument, gave no opinion.

Ordered, adjudged and decreed, "that the decree of his honor, the chancellor, appealed from in this cause, be reversed," and that the record and proceedings be remitted, etc.

POWER OF PARTNER AFTER DISSOLUTION.—For an extended discussion of the subject of the power of a partner to bind his copartners after a dissolution, see the note to *Chardon v. Oliphant*, 6 Am. Dec. 574; see, also, *Brady v. Hill*, 13 Id. 503, and other cases in the American Decisions cited in the note thereto; *Price v. Towsey*, 14 Id. 81; *Graves v. Merry*, 16 Id. 471, and cases cited in note. The doctrine of the principal case on this point is approved in *Fontaine v. Lee*, 6 Ala. 891; *Burns v. McKenzie*, 23 Cal. 102; *Owings v. Low*, 5 Gill & J. 144; *Atwood v. Gillett*, 2 Doug. (Mich.) 216; *Benedict v. Hecox*, 18 Wend. 502; *Brisban v. Boyd*, 4 Paige, 22; *Van Keuren v. Parmelee*, 2 N. Y. 531; *Lacoste v. Bezar Co.*, 28 Tex. 424; *Whetmore v. Murdock*, 3 Wood. & M. 386; *Bispham v. Patterson*, 2 McLean, 90; *Thompson v. Bowman*, 6 Wall. 318. The principal case is cited as authority on the same point in *Doughton v. Tillay*, 4 Blackf. 435. So, in *Mann v. Locke*, 11 N. H. 249, where the English rule is preferred. So, in *Willis v. Hill*, 2 Dev. & B. 234, where it is held, following the rule laid down in *McIntire v. Oliver*, 11 Am. Dec. 760, that an admission of a partner after dissolution will take a partnership debt out of the statute of limitations, but that the debt itself must be proved *aliunde*, and that the admissions of the partner are not admissible for that purpose. In *Gulick v. Gulick*, 14 N. J. L. (2 Green) 582, *Baker v. Stackpoole* is referred to as authority for the general proposition that the admissions of a partner in relation to partnership dealings are binding upon his copartner.

APPLICATION OF PAYMENTS.—On this subject the principal case is often referred to as authority, and the rule laid down therein approved: *Sherwood v. Haight*, 26 Conn. 435; *Horne v. Planters' Bank*, 32 Ga. 12; *Bayley v. Wynkoop*, 10 Ill. (5 Gilm.) 452; *Pattison v. Hull*, 9 Cow. 767; *Allen v. Culver*, 3 Denio, 290; *Van Rensselaer v. Roberts*, 5 Id. 474; *Seymour v. Marvin*, 11 Barb. 90; *Jones v. Kilgore*, 2 Rich. Eq. (S. C.) 66; *Emery v. Tichout*, 13 Vt. 20. So, in *Osterhoudt*, 11 Barb. 34; and *Thomas v. Kelsey*, 30 Id. 273, where it is held that the law will apply an indefinite payment to a debt then exist-

ing and due rather to one not in existence or not due. So the payment will be applied to an unsecured rather than to a secured liability: *Lanier v. Wyman*, 5 Rob. (N. Y.) 160. In *Hatch v. Benton*, 6 Barb. 31, it is held, referring to *Baker v. Stackpoole*, that a payment specifically appropriated is not a set-off.

MCCARTEE v. ORPHAN ASYLUM SOCIETY.

[9 COWEN, 437.]

DEVISE IS DIRECT, WHEN.—Where a testator devised an estate to one upon the death or marriage of his, the testator's, child, or upon such child's attaining his majority, upon the contingency taking place, the devise is direct to the devisee, although the will vests the legal estate in the executors, in trust, to receive the rents and profits for the child's benefit until it shall attain twenty-one, or marry.

IDEM.—If, in such a case, there is a subsequent direction in the will that on the child's marrying or attaining twenty-one, the executors shall sell the realty, and pay one-half the proceeds to such child, and the other half to the residuary devisee, the legal estate will remain in the executors until the trusts are performed, but upon the death of the child before attaining twenty-one, the estate vests directly in the residuary devisee under the devise.

DISAGREEING STATUTES SHALL BE CONSTRUED so that both shall have effect, if possible.

REPEALS BY IMPLICATION are not favored by the law.

ACTS IN PARI MATERIA should be construed together as if they were one law.

THE WORD "PURCHASE," in its most extensive signification, includes a devise.

DEVISE TO A CORPORATION IS VOID by the statute of wills.

STATUTE AUTHORIZING A CORPORATION TO TAKE BY PURCHASE must be construed so as to stand together with the statute of wills prohibiting devises to corporations; hence, in that case, the word "purchase" does not include "devise."

POWER OF PURCHASE CONFERRED BY SUCH A STATUTE is subject to the restrictions of other general laws.

RIGHT TO PURCHASE IS INCIDENT to a corporation, and a statute conferring that right does not extend the signification of the term "purchase."

DEVISE TO A NATURAL PERSON IN TRUST FOR A CORPORATION, held valid by the chancellor, and not questioned by the court of errors.

APPEAL from the court of chancery. The orphan asylum society of the city of New York, respondents, brought suit below against the appellants, as executors of Philip Jacobs, deceased, to recover a certain devise and legacy. The testator, being seised of a real estate, directed, by his will, that after the payment of sundry debts and bequests, including a legacy to the respondents, if he should leave a child living at his death, his executors should receive the rents and profits of his

real estate, and apply the same to the support and education of the said child, and invest the surplus, if any, in stock, to accumulate, and be paid over to such child at the age of twenty-one or marriage. He devised and bequeathed all the rest and residue of his estate, real and personal, after the payment of debts and other legacies, to the respondents, to be applied to the charitable purposes of their institution, the bequest to take effect immediately after the payment of the debts and other legacies, if he should leave no child at the time of his death, or if he should leave a child, then upon the death, marriage, or attaining of the age of twenty-one of such child. Then followed a provision, devising to his executors and the survivor or survivors, or such of them as should act, all his real estate, "subject to the trusts aforesaid;" and directing that when the said child should attain the age of twenty-one or marry, the real estate should be sold by the executors, or the survivor, etc., and one half the proceeds paid to said child, if the child should attain the age of twenty-one or marry. The testator died October 6, 1818, seised as at the date of the will, and his wife surviving him gave birth to a posthumous daughter of the testator about January 23, 1819. The said child died April 5, 1821. The chancellor decreed that the respondents became entitled, under the will, to the testator's estate, real and personal, on the death of the child, subject to the rights of the widow, and assigned his reasons therefor in an elaborate opinion, containing in substance the following points and authorities.

1. Upon a fair construction of this will, this was not a case of a direct devise to the society in question, which would be void under the exception in the statute of wills, prohibiting devises to corporations, because here the devise of the testator's realty was to the executors in trust, to receive and apply the rents and profits for the benefit of the testator's child, if he should leave one, until such child should attain the age of twenty-one or marry, and then to sell such real estate and pay one half of the proceeds to such child, and the other half to the said orphan asylum society; but if the child should die before the age of twenty-one, and before marriage, then upon trust to hold and dispose of the whole real estate, and the proceeds thereof to and for the use of the said society, to be applied to the charitable purposes for which it was established. Hence, the complainants are not to be regarded as standing upon the same ground as if they were the immediate devisees of the land.

2. The English cases cited in 2 Fonb. Eq. 212, bk. 2, c. 1, sec. 2, note 2, and relied on by the executors to show that a devise of land in trust for a corporation is void, as well as a devise of the land itself, were all decided after the enactment of the statute of 9 Geo. II., c. 36, commonly denominated the statute of mortmain, and all but two of them went directly upon the construction of that statute: *Attorney-general v. Weymouth*, Amb. 20; *Mogg v. Hodges*, 2 Ves. sen. 52; *Arnold v. Chapman*, 1 Id. 108; *De Costa v. De Pas*, Amb. 228; *Attorney-general v. Graves*, Id. 155; *Gravenor v. Hallum*, Id. 643; *Attorney-general v. Meyrich*, 2 Ves. sen. 44; *Attorney-general v. Cock*, Id. 273; *Corbyn v. French*, 4 Ves. 418.

3. There is no such statute as that of 9 Geo. II. in force in this state, and therefore the cases decided upon that statute do not apply here, and the exception in the statute of wills is the only impediment to the alienation or testamentary disposition of lands by the owners of the inheritance, which is known to the laws of this state.

4. The exception in our statute of wills, under which corporations are held incapable of taking by devise, was incorporated into it without variation from the statutes of 32 and 34 Hen. VIII., commonly called the statutes of wills, and those statutes were not construed by the English courts, wholly to disable a corporation from indirectly taking the benefit of a devise in its favor: 1 Kyd on Corp. 101. Thus, in *Porter's case*, 1 Co. 22, a devise to the testator's wife for the benefit of an unincorporated society, for the maintenance of a free school, was held effectual, if the beneficiaries should afterwards qualify themselves to take by becoming incorporated and procuring a license to take by grant under the statutes of mortmain. So, in *Attorney-general v. Downing*, Amb. 550, 571; S. C., 1 Dick. 414, a devise of real estate to trustees upon trust out of the rents and profits to establish a college, and after its incorporation to stand seised in trust for it forever, appears not to have been regarded as being affected by the exception in the statutes of wills. So in *Adlington v. Cann*, 3 Atk. 141, it was held by Lord Hardwicke, that a will, made before the mortmain law of 9 Geo. II., devising real estate to trustees in trust, to apply a portion of the rents and profits to building a hospital for the instruction in reading, writing, etc., of as many boys as could be clothed out of the amount given from the rents and profits of the estate, would stand.

5. An incapacity to take land by devise, does not extend to

the use or trust of the land, which is a distinct interest from the land itself, and collateral to it. It is the equitable right to the permanency of the profits of land, whereof another person has the legal seisin and possession, and to direct and control the conveyance of the estate and the defense of the land by the trustee; and that right may be assigned or transmitted by devise or descent. Founded upon these properties of a use or trust, a method was established long before the statute of wills for the testamentary disposition of lands by conveying to feoffees to the use of the feoffors' will, and then, by declaring the uses of the feoffment in the will, thus substituting the use for legal estate, and devising it, though the land itself could not be devised. The estate was said to take effect by force of the feoffment, the will being merely declaratory: Co. Lit. 272, secs. 462, 463; *Sir Edward Clare's case*, 6 Co. 18; although in its practical operation it amounted to a devise of the legal estate: 1 Saund. Uses, 72. This system was in use long before 32 Hen. VIII., and was even recognized in acts of parliament: 7 Hen. VII., c. 3; and 16 Hen. VIII., c. 14. This indirect method of devising is not affected by the statute of wills, and may still be resorted to, as is seen in the case of copyhold estates, which are still devised in this way. This testator might therefore have conveyed his estate by feoffment or fine to the use of his will, and then have declared the uses by his will, without reference to the statute of wills, and it would have been valid. Why, then, are not the same trusts valid when the estate which feeds them is created by devise? The land itself is devised to the trustees, and there seems to be no reason why a corporation may not, as well as a natural person, take the use, which is distinct from the land. The only restraint in England upon the capacity of a corporation to take the use of land vested in trustees, is the statutes of mortmain, which do not exist here.

6. The incapacity of corporations to take land by devise was not created by the statute of wills. The statute created no new disability. It simply left corporations as it found them. The incapacity is merely a remnant of the general disability of alienation by devise which existed before the statute. In conferring the power of alienation of land by will, the statute merely omitted to extend that power to a devise to a corporation. The right to purchase and hold real estate, which is incident to every corporation, is affected by that statute only so far as it respects the power to take in that particular mode. And as this disability is in derogation of the common right to take

and hold property, it should not be extended by construction. The statute does not enable corporations to take land by devise, but it does not prohibit them from taking the use. And since the incapacity does not arise from any prohibition in the statute against corporations taking by devise on the ground that it is illegal or morally wrong, but is a mere disability which is not removed by the statute, this case does not fall within the principle that one shall not do indirectly what the law does not permit him to do directly. This incapacity is analogous to that of a married woman to convey to her husband, and it is well settled that she may do this indirectly by joining with her husband in a grant to a third person, who afterwards conveys to the husband.

7. This is a subsisting use which is not, as contended, executed by the statute of uses so as to pass the estate immediately to the devisees, thus rendering it void by reason of their inability to take. The trust here is that the estate is to be applied to the charitable purposes of the corporation, which is merely constituted the almoner of the testator's bounty, and is not authorized to deal with the estate as its own for general purposes. This is not, therefore, a mere private trust such as the statute will execute. The trustees were bound to convey according to the direction of the complainants, and this, coupled with the manifest intent of the testator, gave their interest the character of an equitable estate, as an express trust to convey indisputably would have done. The testator's obvious intention, from all the terms of the will, was to endow the charity, but at the same time to vest the legal estate in the trustees, which intention should prevail in the construction of the will; and as it would defeat that intention to hold the estate transferred from the trustees to the beneficiaries under the statute of uses, if the beneficiaries were disqualified from taking such estate, that statute could not execute the use.

8. But supposing the statute of uses to execute the trust by vesting the legal estate in the corporation on the child's death, the estate was not thereby defeated under the exception in the statute of wills, for the corporation would take not by the devise but by the operation of the statute of uses. Unless the corporation can lawfully take the estate under the statute, the use can not be executed by the statute. It is essential to the execution of a use by the statute that there should be lawful *cestui que use* in being, who is capable of taking the same estate in the land that he has in the use. If the use could be exe-

cuted under the statute, the corporation was capable of taking the estate under the statute. On the other hand, if the corporation could not take, the statute could not execute the trust. The title of the corporation is therefore valid either as a legal or equitable estate.

9. But granting that the devise is void in law as being a devise of land to a corporation, the trust upon which the devise was made being a trust for a definite charitable purpose may be enforced in a court of equity. It has long been the practice of the court of chancery in England to take cognizance of such trusts. This jurisdiction existed and was exercised before the statute of 43 Eliz. c. 4, usually termed the statute of 'charitable uses, that statute being remedial in its nature and not intended to create the charitable uses to which it applies, but merely to provide a more efficient method of enforcing those which already existed. Notwithstanding the "tradition" to the contrary mentioned by Lord Loughborough in *Attorney-general v. Bowyer*, 3 Ves. 714, it is the clear testimony of some of the most enlightened English jurists that the court of chancery, long before the statute of Elizabeth, had cognizance of informations by the attorney-general for the establishment of charities: *Eyre v. Countess of Shaftsbury*, 2 P. Wms. 103, per Sir Joseph Jekyll; *Lord Falkland v. Bertie*, 2 Vern. 333, per Lord Somers; *Case of Christ College*, 1 W. Bl. 90, per Lord Keeper Henley, afterwards Lord Nottingham. There are several adjudications between the statute of wills and the statute of charitable uses apparently supporting the jurisdiction: *Weleden v. Elkinton*, Plowd. 523, and cases cited in *Duke on Charitable Uses*, 154; *Doctor Floyd's case*, reported as *Griffith Flood's case*, in Hob. 136. Devises to corporations for charitable uses subsequent to the statute of wills, and both before and after the statute of 43 Eliz., though void in law for want of capacity in the corporation to take, were held good as uses binding the lands in the hands of the heirs: *Hallum's case*, *Duke on Charitable Uses*, 80, 375; and *Doctor Floyd's case*, before referred to. Anciently the course was in the case of such charities to proceed by information in the name of the attorney-general, but the rule has been modified, and in many cases the ancient method has been superseded by an original bill by the party suing in his own name: See *Morrill v. Lawson*, 4 Vin. 500.

10. It is a settled doctrine of the court of chancery in the construction of wills and the administration of trusts that a trust shall never be permitted to fail through failure or disability of

the trustee, but that such trust is fastened to the land in the hands of heir or devisee, and will be enforced by the court whenever a competent party sues for its aid; and this not with reference to the statute of 43 Eliz., or with respect to charitable uses alone: *Brown v. Higgs*, 4 Ves. 708; S. C., 5 Id. 495; 6 Id. 656; *Sonley v. Clockmakers' Company*, 1 Bro. C. C. 81. The principle deducible from these cases is that equity regards the substance of the trust, and if the estate devised and the objects of the testator's bounty are described, designated, and defined with sufficient certainty, the death, disability, refusal, or other failure of the trustees will not be suffered to disappoint the testator's intention; but the trustees, heir, or executor, in whom the legal title is vested, will be charged with the trust, and its performance will be enforced by the court for the benefit of those to whom the will gives the beneficial interest. *Jackson v. Hammond*, 2 Cai. Cas. 337, and *Baptist Association v. Hart's Executor*, 4 Wheat. 1, have been referred to as controlling authorities against the title of the complainants in this case; but the decision in the former case is applicable to questions of title in a court of law and is not to be regarded as settling the principles applicable to trusts in a court of equity, and in the latter case the question raised here was not necessarily involved, but the point was whether or not a charitable bequest can be supported, where no legal interest is vested and no person is designated to take beneficially. The decision in *Coggleshall v. Pelton*, 7 Johns. Ch. 202 [11 Am. Dec. 471], has a more direct bearing. In that case Chancellor Kent sustained and enforced a charitable bequest to a town, which, if it had been a bequest for a mere private purpose, would have been inoperative and void. In this case the object of the testator's bounty is clearly pointed out, and his charitable intention is not to be mistaken. If, therefore, the trust in the executors is valid and not affected by the statute of uses, the complainants are clearly entitled to have it enforced; if, on the other hand, the legal estate has become void in law, owing to the exception in the statute of wills, or by the operation of the statute of uses, this is a mere failure of trustees, by the incapacity of the corporation, the chosen agents of the testator's bounty, to take the estate, and as the trust for the orphans is clear and expressed with precision, it is a charge in equity upon the land and must be enforced by the court, or it will permit a trust to fail for want of a trustee to execute it.

11. If the devise here is to be regarded as a direct one to the

complainants, or if the trust is considered as executed, so that the estate is vested in them as immediate devisees, still it does not fail by reason of their incapacity to take by devise. The society is made capable, by its act of incorporation, of purchasing, holding, and conveying any estate, real or personal, to the use of the corporation, not to exceed one hundred thousand dollars, to be applied only to the purposes of its corporation. The term "purchase" includes all modes of acquiring property, except by descent, and, of course, embraces a devise. The use of that term in this case, therefore, gives the corporation power to take by devise. The statute of wills is not opposed to this construction, for, as already shown, that statute does not prohibit devises to corporations; it merely fails to confer upon corporations the power to acquire property in that way. That defect is remedied by the act of incorporation in this case. But if it be conceded that the statute of wills does prohibit devises to corporations, this corporation is made an exception to that statute by its act of incorporation expressly conferring the power to purchase land which necessarily includes the power to take by devise. That the word "purchase" does include the acquisition of property by devise, see *Radcliffe v. Boper*, 10 Mod. 89; S. C., Id. 230; *Ratcliffe's case*, 1 Str. 267. These were cases of disabling statutes, but there is no reason why the same rule of construction should not apply to an enabling statute: See, also, *Attorney-general v. Bowyer*, 3 Ves. 727, 728, where it is distinctly intimated that a corporation authorized by license to hold real estate may take lands by devise. Wooddeson, also, 2 Wood. sec. 355, evidently understands that an authority or license to purchase lands is sufficient to enable a corporation to take by devise.

12. The objection that there is a want of parties to this bill because the legal estate, in the events that have happened, has resulted to the heir, is not tenable. Where the whole legal estate is devised to a trustee upon definite and perpetual trusts, which exhaust the testator's whole interest, how can that legal estate result or descend to the heir? The executors to whom the estate here was devised were capable of taking, and whatever becomes of the trusts the legal estate is in them: *Doe ex dem. Toone v. Copestake*, 6 East, 328.

From the chancellor's decree the defendant appealed.

J. Platt and J. V. Henry, for the appellant.

S. Boyd and D. B. Ogden, contra.

WOODWORTH, J. The will of the testator declares that if he left any child alive at the time of his death, the executor should receive the rents and profits for the benefit of such child until it should attain the age of twenty-one years, or marry.

The next clause devises the rest and residue of the real and personal estate to the respondents, to take effect immediately after debts and legacies are paid, if the testator should leave no child; and if he should leave a child, then upon the death, marriage, or attaining of twenty-one years of age of such child.

From this statement, it is evident that had there been no child, the devise was direct to the respondents, and in that event, it was undoubtedly intended they should take immediately. But there was a child, and consequently no estate passed to the respondents at the death of the testator. The latter part of the preceding clause is to be taken in connection with that giving the rents and profits to the child, if any was left, inasmuch as the executors were to apply the rents and profits until marriage or twenty-one years of age. The testator suspended the vesting of the estate in the respondents until the happening of either of those events. Upon the contingency taking place, the devise is direct to the respondents.

Thus far the intent is plain; but it will be observed that the will had not yet declared in whom the legal estate should be vested from and after the death of the testator, until the death, or marriage, or lawful age of the child that might be left. As the executors were to receive the rents and profits if the contingency contemplated should happen, it was advisable to give them the legal estate during the continuance of this trust; and, accordingly, we find that the next clause in the will makes such a provision. It devises to the executors all the real estate subject to the trust aforesaid. This manifestly refers to such trusts as the executors were to perform. What are they? No other trusts were imposed on them, excepting that they should apply the rents and profits for the benefit of the child, in the manner the testator had designated. They did not hold the real estate in trust for the respondents, to be conveyed to them on the happening of a certain event, for this, to my mind, conclusive reason, there was no necessity that they should hold for the respondents, because the testator had declared that, on a certain contingency, the estate should go to the respondents. That event has happened; and, therefore, by force of the will, if they are capable of taking, they took the legal estate directly. They needed not the aid of trustees to pass this estate to them. I

consider their title as accruing independent of any act or thing to be done by the trustees.

Then follows a further direction, which is somewhat at variance with the disposition made before.

The testator proceeds to declare that when the child shall attain twenty-one years, or marry, his real estate should be sold by the executors, and one half of the proceeds to be paid to such child. Now, upon the established principle of collecting the intent from the whole will taken together, and reconciling discordant parts with each other, the question arises, What is the effect of this clause? In the first place, I think it must be conceded that it clothes the executors with an additional trust. In a certain event they are to sell, and pay half the proceeds to the child. How is this clause to operate upon the preceding devise, which declares that on the death, marriage, or attaining of twenty-one years by the child, the respondents are to take all the real and personal estate? They can not stand together. I think the effect of the last clause is to qualify and diminish the *quantum* of interest which had before been given to the respondents provided the child married or attained twenty-one years. Instead of the whole, which the words of the preceding part give, the testator has in the conclusion declared that his child shall receive half. This, then, operates as a diminution of the respondents' interest *pro tanto*. It also changes the manner of conferring on them the testator's bounty. Under the first clause, the estate, such as it was, would pass to them. Under the latter, they are restricted to one half; and as the executors were to sell the estate, had the contingency happened, then and in that case, their claim would be for half of the money, not half of the land. Upon the supposition that the child had lived to twenty-one or married, I admit that the legal estate would have remained in the executors, until they had performed the trust before specified; and had they refused to pay one half of the proceeds of the sale, the respondents would be entitled to relief. Such are my views as to the construction of the will. If they are correct, then it follows that, as the testator left a child, the estate did not vest in the respondents at his death; but it vested in the executors subject to the trusts I have mentioned; and such estate so vested in the executors ceased on the death of the child. The objects for which it was created then ceased. There were no rents or profits to receive for the benefit of the child, nor could there be a sale of the estate. The death of the child was an event which de-

prived the executors of all further power or control over the real estate, and vested it in the respondents. If so, the estate was devised to them directly.

If the construction given is not erroneous, it is a conceded point that the devise is void by reason of the exception in the statute of wills, unless the authority to purchase, given by the act incorporating respondents, includes the right to take by devise; which forms the remaining point in this clause. It is a well-settled rule, that where there is a discrepancy or disagreement between two statutes, such exposition should be made as that both may stand together. In the present case, there is no express authority in the act of incorporation to take by devise; but it is contended that the term "purchase" includes devise, as well as an actual purchase for valuable consideration. If it be admitted that such is the legal import of the term, it appears to me that does not decide the question. The inquiry is, ought the term to be construed in its most comprehensive sense, when, by so doing, the effect is to repeal the express words of a prior statute; or in a more limited sense, according to the popular acceptance, thus leaving the former act unimpaired? It is laid down in 19 Vin. Abr. 525, pl. 132, that repeals by implication are things disfavored by the law, and never allowed of but where inconsistency and repugnancy are plain and unavoidable; "for these repeals carry along with them a tacit reflection upon the legislators, that they should ignorantly, and without knowing it, make one act repugnant to and inconsistent with another; and such repeals have been ever interpreted so as to repeal as little of the preceding law as possible." It is also a rule of law, that all acts in *pari materia*, are to be taken together as if they were one law.

The statute of wills prohibits a devise to a corporation; the act incorporating the orphan asylum society declares that they may purchase real estate. In the most extensive signification of the word "purchase," it includes a devise, and, therefore, relates to the subject which, by the statute of wills, is excepted. These statutes, I apprehend, ought to be construed together, and inasmuch as the right claimed is, by the former statute, expressly denied, it would seem to be more congenial to the spirit of both acts, to understand the word "purchase" in a restricted sense, and as so intended by the legislature. The consequence of such a construction is that the statute of wills has full operation, and the term "purchase" is confined to such other modes of acquiring real estate as do not include a devise.

The legislature may be considered as granting to this corporation the right to purchase subject to other existing statutes, and not as conferring a right to purchase without restraint. It can not be that such a clause was intended to overleap positive restrictions found in other statutes. On this principle, I do not perceive why the statute of frauds, or that against maintenance, may not be passed over as in effect repealed, so far as the right claimed by this corporation is concerned. And yet it will not be pretended that the term "purchase" is to be carried to that extent. If not, what are the grounds upon which the restriction rests? Manifestly these: You may purchase and hold real estate, it is true; but in making the acquisition, it must be remembered that the laws of the state have declared certain requisites essentially necessary to perfect a title, and in certain cases have denied the right altogether. Whatever can be purchased consistently with these laws, is granted; what can not is denied.

Again, the right to purchase is incident to a corporation, and would exist if the statute had not conferred the right. But I presume it will not be contended that this incidental right, had the act of incorporation been silent, would have authorized the corporation to take by devise. Why, then, should the term "purchase," when used in the act, have a more extensive signification than it would have as incidental to the power of the corporation? It seems to me that in both cases the meaning of the term is the same. The act conferred no additional power in this respect. The principal object of this clause was to limit the amount of property the corporation was authorized to hold.

That the right to purchase in a corporation does not include the right to take by devise, appears to have been the opinion of the supreme court in the case of *Jackson v. Hammond*, 2 Cal. Cas. in Err. 337. The opinion was delivered by Mr. Justice Benson. The construction of the act of April 6, 1784, enabling churches to incorporate themselves, was under consideration. The act declares that the trustees appointed under it shall have good right and lawful authority to take, acquire, and purchase lands, tenements, and hereditaments. The expressions are as ample as in the act incorporating the orphan asylum society.

It is manifest, however, the court did not consider those words as conferring a right to take by devise. It was contended that by the statute of the sixth of April, 1784, enabling churches to incorporate themselves, they are constructively (with respect

to lands possessed or held by them at the time of their incorporation) made capable of taking by devise. The court held that the term devise in that act referred to goods and chattels, not to lands and tenements. And it may here be observed that whether that construction was well founded or not, the term devise there used had reference only to such property as the church or congregation may have held before and at the time of incorporation. As to future acquisitions, the fifth section of the act regulates them in the terms I have already stated. Under that clause, it was considered that a power to take by devise was not granted. It was not, it is true, the direct question before the court; but the view taken is nevertheless entitled to respect, and is of considerable weight in deciding the construction of similar words in a subsequent statute. From the scope of the opinion, I infer that the learned judge entertained no doubt on this point. He observes: "The only manner in which, had they been incorporated, they were capable of taking, being by gift or grant, and not by devise;" and, again, when speaking of the construction contended for, that the word "devise" applied to lands which the church held before incorporation. he further observes: "If this construction is to obtain, then this consequence will follow: That the legislature must be supposed to have intended to give to a church a capacity to hold lands, as it were, before their incorporation, and refuse to them a capacity to take, and consequently to hold lands acquired after their incorporation; and without a reason for the discrimination." It was, therefore, considered that after incorporation the corporate body could not take by devise.

I have thus very briefly given my views as to the construction of this statute, and arrived at a conclusion that the exception in the statute of wills is not effected by the grant of powers to the Orphan Asylum Society. It is unnecessary for me to discuss the various other questions which have been examined by his honor, the chancellor; as my opinion upon the whole case rests on this ground, that, on the death of the child, the estate was devised directly to the respondents; that after that event there were no trusts remaining for the executors to execute, those imposed upon them by the testator having ceased; and that the devise being void by the statute of wills, the decree in the court below should be reversed.

SUTHERLAND, J., concurred.

SAVAGE, C. J., being related to the appellant, gave no opinion.

ALLEN, DAYAN, ELSWORTH, HAGER, HART, LAKE, McCARTY, McMARTIN, WATERMAN, and WILKESON, senators, concurred.

CRAZY, Senator. (After stating the facts.) The respondents claim the whole residuary estate of the testator. The claim to the real estate is resisted on the ground that the respondents, being a corporation, are disabled by the exception in the statute concerning wills to take by devise. By this act it is provided that any person having any estate in lands may, at his own free will and pleasure, give and devise the same to any person or persons, except bodies politic and corporate, by his last will and testament.

This exception is found in "an act to reduce the laws concerning wills into one statute," passed third of March, 1787: See 1 Greenleaf's ed. L. 387. At that period, the people of this state could not have been jealous of corporate bodies, for very few existed. We must, then, look for the reason of this exception to some other cause; and as we find it in the statute of Henry VIII., it is most likely it was adopted upon the authority of the parliament of Great Britain; and no question having arisen upon it in this state, the exception has been continued in the subsequent revision of the laws. If the right to dispose of real estate by will is created by statute, then the legislature may qualify the right; but if it existed before the statute, then the legislature by affirming it in one part can not restrain the exercise of it in another.

Sir William Blackstone says, 2 Com. 373: "It seems sufficiently clear that before the conquest, lands were devisable by will. But upon the introduction of the military tenures, the restraint of devising lands naturally took place as a branch of the feudal doctrine of non-alienation without the consent of the lord." Paley, in his *Philosophy*, c. 13, says: "Since the conquest, lands in this country could not be devised by will till within little more than two hundred years ago, when this privilege was restored to the subject by an act of parliament in the latter end of the reign of Henry VIII." Robertson, in his *history of Charles V.*, vol. 1, note 8, of proofs and illustrations, says: "The victorious troops divided the conquered lands. Whatever portion of them fell to a soldier, he seized as the recompense due to his valor, as a settlement acquired by his own sword. He took possession of it as a freeman in full property. He enjoyed it during his own life, and could dispose of it at pleasure, or transmit it as an inheritance to his children. Thus, property in land became fixed. It was at the same time allodial,

that is, the possessor had the entire right of property and dominion."

These references clearly show the right to dispose of real estate by will in England previous to the statute of Henry VIII. And it is worthy of remark that while this right continued, the tenure by which lands were held in England was allodial; the precise tenure by which they are held here. Thus, it would seem that the devise of real estate for the benefit of the respondents is not void from the testator's incapacity to make it, but valid at common law.

The next question is as to the ability of the respondents to take and hold real estate. That is settled by the act incorporating them (30 sess. p. 508, sec. 1), by which it is enacted that "the orphan asylum society in the city of New York by that name shall be capable in law of purchasing, holding, and conveying any estate, real or personal, for the use of the said corporation; provided, such estate shall not exceed in value one hundred thousand dollars."

The value of the estate belonging to the respondents nowhere appears, and it is not to be presumed that it exceeds the amount allowed to be held by their charter. This act of incorporation appears to have been passed on the seventh of April, 1807, and may be referred to for another purpose. It is the sense of the legislature, after the experience under the statute concerning wills for twenty years, that the policy of the exception in that statute was wrong, at least so far as it respected the orphan asylum in the city of New York, and it may be questionable whether the exception is not thus far abrogated. It was assumed in argument, that if the testator was not disabled by the exception from devising to the orphan asylum, it was not in the power of the legislature to prevent devises to any corporate body, and to any extent; but it was not pretended that the legislature might not repeal the exception.

The orphan asylum have the capacity to take and hold real estate to the amount of one hundred thousand dollars, and are not disabled to take by devise. On what principle, then, can it be said they shall not take? Suppose the statute had provided that the orphan asylum might take by devise; can it be pretended that a devise in that case would not be valid?

If the statute had enacted that the orphan asylum might take by devise, it would have been a limitation upon the right to take generally, and might possibly be considered as excluding the right to take in any other way; for the right to take and

hold generally includes all the ways and means by which property can be acquired.

Which of the statutes, then, shall we give effect to? It is a familiar principle that a new statute repeals an old one, if inconsistent with it. In the present case, the statute concerning wills prohibits a devise to a corporate body; and twenty years afterwards the legislature incorporate the orphan asylum society in the city of New York, and declare the society by that name capable in law of purchasing, holding, and conveying any estate, etc. I need not mention that title by purchase includes that by devise.

Thus it will be seen that both statutes may stand together, and that is desirable, whether inadvertently or advisedly passed. But there is another view of the subject which would induce me to be in favor of affirming the decision of the chancellor. All tenures of land granted by the people of this state, etc., shall be and remain allodial and not feudal: 1 R. L. 71. This act was passed before the act concerning wills. Allodium, as defined by Blackstone, is the land possessed by a man in his own right, without owing any rent or service to any superior: 2 Bl. Com. 104. The absolute rights of each individual are the right of personal security, the right of personal liberty, and the right of private property: 3 Bl. Com. 119.

It is the last, that of private property, which has been invaded by the exception in the statute concerning wills. And I now advert again to the argument, that if the devise in question is not within the exception in the act concerning wills, it is not in the power of the legislature to restrain devises to corporate bodies. And I ask why it should be. The very definition of municipal law limits the power of the legislature to commanding what is right and prohibiting what is wrong. If the legislature can restrain us as it respects our charitable donations, they may also compel us to make them; for whatever is a subject of legislation may be commanded as well as prohibited.

And if the legislature can declare a devise to the orphan asylum invalid, they may, upon the same principle, make us pay tithes of all we possess.

This is a free representative government, and one of the prominent features by which it is distinguished from a despotic one is the preservation and protection of individual right; for it can make no difference with the citizen what the form of government is that oppresses him and deprives him of his right,

whether it consists of one tyrant or one hundred and sixty, if his suffering and deprivation are the same.

It is difficult to conceive on what principle men elected by the people for public purposes can limit and restrain individuals in the exercise of their legitimate rights. If individuals give up any part of their rights by becoming members of society, it is that they may obtain protection for such as remain; and on the same principle that allegiance is demanded by the government, protection is claimed by the citizen; and if not granted, the original compact is broken. If courts of justice have occasion to advert to first principles, the object should be the protection of individual right, and not to confirm legislative usurpation; and in a government founded on principle it is the duty of the judiciary department to decide in favor of individual right, when it is required to be done on fundamental principles, though it should be to declare invalid an act of the legislature. The contest which ended in the separation of these United States from Great Britain, was a contest for individual right, intended to be secured by the constitution of the United States. But of what avail is it that no law shall be passed impairing the obligation of a contract, or that private property shall not be taken for public use without a just compensation, if the paramount right to dispose of our property by will is denied us?

In a government founded on principle, the application of it is the only limitation of power. The judiciary, although the weakest, is the most independent branch of government, and the only branch that can, by the force of principle, limit and restrain the exercise of power. Can it, then, admit of a doubt that it is the duty of the judiciary so to apply principle as to prevent any encroachment by the legislature upon individual right?

Although I have taken a view of the subject somewhat different from the chancellor, I am, however, satisfied with the different views which he has taken. Yet, I think, his decree ought to be so modified as to allow the appellant his costs; inasmuch as he has acted under the advice of counsel, and I see nothing reprehensible in his conduct.

STEBBINS, Senator. The merits of this case do not appear to me to lie beneath the mass of learning which has been displayed in the investigation of the case. As I view it, the inquiries whether a devise of lands to a corporation directly, is void or

not, under the statute of wills, and if void, whether such a devise can be sustained in equity in virtue of the general powers and jurisdiction of the court of chancery in cases of trust, do not become material. The questions presented by the case, as I view it, are, first, whether the testator, Philip Jacobs, devised the real estate in question to the corporation directly, or to his executors, subject to the trust mentioned in the will; second, whether the devise to trustees for the use of the respondents is a valid devise, under which they can take as *cestuis que use*; and, third, whether the use is executed by the statute of uses, and if so, the effect. To carry into effect the intention of the testator, is a cardinal rule in the construction of wills, and to do so it is necessary to give effect to every part of the instrument, if possible.

The testator devises all the rest, residue, and remainder of his estate, real and personal (which includes the premises in question), to the orphan asylum society, to be applied to the charitable purposes for which the association was established, to take effect immediately after the payment of debts and legacies, if he should leave no child; but if he should leave a child, then to take effect upon the death, intermarriage, or attaining of age of such child.

This, it is contended, is a direct devise to the respondents of the real estate in question; and, standing alone, it would undoubtedly be susceptible of no other construction; but he proceeds to devise all his real estate to his executors, subject to the trust aforesaid; and declares his will to be that whenever such child should attain the age of twenty-one years or marry, his real estate should be sold by his executors, and one half the proceeds paid to such child.

The testator had a posthumous child, which died at about the age of two years. Had that child lived, and attained the age of twenty-one years, no doubt can be entertained of the intention of the testator that it should then be entitled to a moiety of the proceeds of the real estate, which was to be sold by the executors. But such a provision is in hostility to the previous devise to the respondents to take effect upon the coming of age of the child. Upon the happening of that event, by the first clause, the estate was to vest in the corporation, and by the subsequent one, to be sold by the executors, and one half the proceeds paid to the child. If, therefore, the first devise is to be carried into effect according to its terms, the latter provision is entirely without effect. To give effect to every part of the will,

it seems to have been the obvious intention of the testator, if he should leave a child, to devise the real estate to his executors in trust for the society, if such child should die under age and unmarried; if not, then upon the maturity or marriage of the child to be sold, and the proceeds divided between the society and such child. The executors, then, took the estate at the death of the testator, subject to these trusts; and the question arises whether at the death of the child under age and unmarried, the real estate was, by the terms of the will, to vest in the corporation. It has been said upon the argument that if the executors took the estate as trustees, they can only be divested of that trust by their own grant, or by operation of the statute of uses; but I can perceive no objection (provided the terms of the will require it) to their holding the estate in trust until the happening of an event such as the death of this child, and then that the fee should vest in other persons, by way of executory devise. Was it, then, the intention of the testator, upon the happening of this contingency, that the fee should vest in the corporation, or continue in the trustees for their benefit? The latter appears to me to be the fair construction of the will.

In one paragraph he devises, after the payment of debts and legacies, "all the rest, residue, and remainder of his estate, real and personal, to the respondents, to take effect upon the death of this child;" and in the next he devises his real estate to his executors, subject to the trust aforesaid. It was a use, therefore, or beneficial interest, which I suppose he intended to devise to the respondents, leaving the fee in the hands of the trustees.

If, as I have endeavored to show, it was not the intention of the testator to devise the estate directly to the respondents, upon the coming of age of his child, it is a strong argument to prove that such was not his intention in case of the death of such child; for both contingencies are coupled in the same paragraph, and there is no limitation to the trust created in either case.

The next, and more important, question is, whether the corporation can take the use under this will, notwithstanding the provisions of our statute of wills. This statute enacts that any person having any estate of inheritance in any lands, tenements, or hereditaments, may give or devise the same, or any rent or profit out of the same, to any person or persons (except bodies politic and corporate), by his last will and testament, or by any other act by him lawfully executed;

and it is contended, that if a devise to a corporation directly would be void, a devise of the use is also void. Although in England, under the Saxons, lands were devisable by will at common law, yet, at the conquest, and upon the introduction of the feudal system, the common law underwent a complete change in this respect; and an estate in fee-simple in lands was no longer devisable. It became inconsistent with the nature of that system, that a tenant should have an unlimited power to devise his lands; for the reason that he might devise to persons incapable of performing feudal services. The power of alienation by devise (except of a chattel interest) is in England, then, to be traced to the statute of wills of the 32 Henry VIII., c. 1; and 34 Id., c. 5.

Our statute of wills is a transcript of these, with the additional enumeration of rents and profits. It is contended that the terms rents and profits, mentioned in the statute, are intended to describe a use, and that as the lands can not, so the use also can not, be devised to a corporation under this statute.

I apprehend, however, there is a material difference between rents and profits, and that which has long been known under the denomination of a use. Rents and profits are incorporeal hereditaments; but a use is not. A use is said to be neither *jus in re* nor *ad rem*, neither right, title, nor interest in law, but a species of property unknown to the common law, and owing its existence to the equitable jurisdiction of chancery, resting upon confidence in the person and privity of estate; a thing collateral to the land, and only annexed to a particular estate in it, not to the mere possession; so that when the estate to which the use is annexed is destroyed, the use itself is destroyed, as by disseisin, or the entry of tenant by the courtesy or in dower. It was rather a hold upon the conscience of the feoffee to uses, than a lien upon, or interest in the land; and the principle upon which it was founded was, that the feoffee was bound in conscience to follow the directions of the feoffor: See Cru. Dig., tit. 11, c. 2. A thing so subtle, and cognizable only in courts of equity, which act upon the conscience, differs essentially from an incorporeal hereditament, which is of legal cognizance.

Indeed, incorporeal hereditaments, such as rents, advowsons, etc., were the subject of conveyance to uses. If, then, a use is not comprehended in the terms of the statute, the argument rests upon the ground that if a devise of land to the corporation would have been invalid, the devise of the use is equally so.

It might perhaps be conceded, that if corporations were pro-

hibited by statute from taking the fee by devise (which, by the by, is not the case), the law would not allow them to take the use. But the history of the English law furnishes at least a plausible argument against such a proposition. Corporations were prohibited by several statutes of mortmain from holding lands; yet it was deemed necessary to enact the statute of 15 Rich. II., c. 5, declaring uses subject to the statute of mortmain: *Chudleigh's cases*, 1 Rep. 120.

But the statute of wills is an enabling statute, and not prohibitory. Before this statute, individuals had no capacity to devise lands; but this enabled them to do so, except to corporations. In conferring the capacity to devise, the legislature withheld the capacity to devise to a corporation, and for what reason? Before the statute of wills, corporations were prohibited by the mortmain acts from taking or holding lands, or uses arising from them. The exception, therefore, in the statute of wills, could not have been introduced for the purpose of prohibiting corporations from taking by devise; for they were already prohibited from taking in any mode; but was to guard against enabling them to take by devise. Without the exception in the statute of wills, in England, they would have been enabled to take by devise, when the mortmain acts would have prohibited their taking in any other way.

The history of the statute, I think, fortifies this view of it. In the first statute of wills (32 Hen. VIII., c. 1), corporations were not excepted, and were therefore enabled to take by devise in common with other persons, contrary to the policy of the statutes of mortmain; but two years afterwards, the parliament, finding the mortmain acts so far repealed by the statute of wills, passed a new statute (34 Hen. VIII., c. 5) not prohibiting corporations in terms from taking under the statute of wills, but entitled "an act for the explanation of the statute of wills," in which they re-enact the provisions of the first statute of wills, and introduce the exception as to corporations, not, therefore, expressly prohibiting corporations from taking, but qualifying the capacity to devise. The intention seems to have been to rely upon the mortmain laws, to keep property from corporations, and to qualify the statute of wills so as not to interfere with those prohibitory acts.

The distinction is a wide one between an incapacity to devise and a prohibition against taking, for although there may be an incapacity to devise directly to a corporation, yet such incapacity will not prevent the corporation from taking by grant

from the devisee in trust, if there is no prohibition against their taking. So, too, there may be an incapacity to devise lands to a corporation, and yet the corporation may take a use. But in either case, if prohibited from taking, the law would not probably allow that to be indirectly done which was directly prohibited. If, then, there is no other reason arising from the statute of wills why corporations may not take lands by devise, except the want of capacity in the devisor to convey, there would seem to be no objection in this case against the corporation's taking as *cestui que use*, for a devisor has capacity to devise a use, and this corporation is not prohibited from taking and holding either land itself or a use. All the English mortmain acts, including the 15 Rich. II., are repealed by our statutes. And if corporations can not take by devise, merely for want of capacity to take in that particular way, the cases of a conveyance from a wife to her husband through the intervention of a trustee, and of a tenant in tail to a purchaser by means of a common recovery, seems to be conclusive to show that an indirect mode of conveyance is no fraud upon the law when resorted to only to remedy a want of capacity to convey directly.

But it is contended, that inasmuch as our legislature saw fit to repeal the English mortmain acts, including the statute of 9 Geo. II., c. 36, which prohibited all charitable bequests, unless made and enrolled one year previous to the death of the donor, the policy of retaining the exception in the statute of wills was to prevent impositions upon persons in *extremis* who might easily be persuaded to dispose of property to ecclesiastical incorporations for charitable uses, after it should no longer be of use to themselves.

Such an object, however, would not seem to comport with the policy of the legislature, who neither saw fit to prohibit corporations from holding lands, nor to impose the restraints of the statute of 9 Geo. II. If the policy was to prevent impositions, why was not the exception in the statute aimed at devises for religious or charitable purposes, instead of devises to corporations generally? There surely is no danger of persons making improvident devises to moneyed or manufacturing corporations. The English statutes, which the legislature were re-enacting, furnished every variety of prohibition against improvident devises, much better calculated to effect the object than any general prohibition of devises to corporations. They guarded against improvident devises, whether to individuals or corporations, for religious, superstitious, or charitable uses.

If it is shown that the exception in the statute of wills is to be regarded, not as a prohibition against the taking of lands by a corporation, but as a qualification of the capacity to devise, created by that statute, the opinion pronounced in the court of chancery in this cause contains another view of the subject which appears to my mind perfectly conclusive. It is, that before the statute of wills, when persons were not capacitated to take lands by devise, they might nevertheless take the use in that way, and therefore, that since the statute of wills, although corporations can not take lands by devise, yet they may take the use, there being no prohibition. Corporations, since the statute of wills, stand in the same situation as to taking lands by devise as all natural persons stood in before that statute.

If, therefore, a use was devisable before the statute, a corporation may take a use by devise since the statute, especially if it be such as is not executed by the statute of uses. It is said by Cruise that uses were devisable, though lands were not; and persons by that means acquire a disposition of property for the benefit of their families which they had not otherwise. They were the invention of ecclesiastics to evade the statutes of mortmain. And after the fifteenth Rich. II., c. 5, which subjected them to the statutes of mortmain, the practice of conveying to uses was continued as the most effectual mode of evading the hardships of the feudal tenures, and of securing estates from forfeiture for treason. They became general, and were applied to purposes inconsistent with the policy of the government. Feoffments were made secretly; so that persons that had to sue, found it difficult to ascertain the right tenant against whom to bring their *præcipe*. Widows were deprived of their dower, husbands of their courtesy, purchasers and creditors were defrauded, the king and other lords lost their profits, fines, etc., and obscurity and confusion of titles prevailed.

During the long and bitter contest between the houses of York and Lancaster, most of the lands in England are said to have been conveyed to uses. As these evils came to be felt, the parliament attempted from time to time to apply a remedy. By the 50 Ed. III., feoffments to the uses of the feoffor were made liable to execution creditors; by the 1 Rich. III., c. 1, all conveyances by *cestui qui use* were made valid; by 1 Hen. VII., c. 1, a formedon was given against *cestui qui use*; by 4 Hen. VII., c. 17, lords were entitled to wardship of *cestui qui use*; by 19 Hen. VII., c. 15, further relief was extended to creditors; by 23 Hen. VIII., superstitious uses were suppressed; and finally, by the statute of

uses, 27 Hen. VIII., c. 10, after reciting all these mischiefs, the legislature declared that possession shall be annexed to the use. The object of the crown was to reassert its rights of wardship, and other feudal profits out of the lands of the nobility; and the intention of parliament was to abolish uses by changing them into legal estates and subjecting them to rules of common law tenures. The construction of this act, however, in a great measure defeated the intention of the legislature. Transferring the possession to the use by this statute gave rise to a mode of conveyance, by this means, which, on account of its convenience, by dispensing with the ceremony of livery, soon came into general use; so that uses, instead of being suppressed, were resorted to as the common and most simple mode of conveyance. And it being determined that all uses were not executed by that statute, its operation was circumscribed; and a large class of uses were left untouched, and have continued to this day under the denomination of trusts, constituting one of the principal branches of equity jurisdiction. It was said by Lord Hardwicke, 1 Atk. 591, that this statute, made upon great consideration, introduced in a solemn and pompous manner, by its strict construction has had no other effect than to add, at most, three words to a conveyance. Before the statute of uses we have seen they were devisable to natural persons, although there was then no statute of wills nor any common law capacity to devise.

The operation of the statute upon uses is said to have been by turning the use into land, to render it not devisable in the same manner as the land itself: 2 Black. Com. 375. This is the language of the elementary writers; and during the short period of time between the statute of uses and the subsequent statute of wills, a period of only five years, I have not been able to find any case, and few, if any, could have arisen, going to sustain, impeach, or explain the proposition. If it is meant that during this period a *cestui qui use*, under a feoffment or other conveyance, was, by force of the statute of uses, to be regarded as the owner of the land so far as to incapacitate him to devise such use, he having no capacity to devise land, I perceive no objection to the proposition.

But to render the doctrine applicable to this case, it must go farther, and be held to mean that a use created by will is converted into land by the statute, and therefore was not devisable. One of the things necessary to the execution of a use by the statute is "*a use in esse*;" and it seems to be difficult to conceive how the statute can operate upon a use until it shall be

raised, and in existence; and if a use was raised in this case, it can only be in virtue of a capacity to devise such an interest. There being, then, a capacity to devise the use, the operation of the statute upon it, if it is such a use as could be executed by the statute, it appears to me could be no other than by annexing the possession to the use, to vest the estate in the devisee, who would take, not as devisee, but under the statute of uses. And there would seem to be no objection to the execution of the use in this case, if the position is correct that the corporation are not prohibited from taking, whatever may be the objection as to the capacity of the testator to devise to it directly; for it has been held in the case of a feoffment by the husband to A., for the use of his wife, that such a use is executed by the statute, notwithstanding the husband had no capacity to convey directly to his wife: Cru. Dig. tit. 11, c. 3, sec. 28. But all the reasoning arising from the statute of uses is answered, if the use in this case is such as could not be executed by that statute; for clearly, in such case, it could have no operation to destroy the capacity to devise. The question then arises, whether the use in this case is within the statute; and the examination of it necessarily casts us back upon the will, to seek for the intention of the testator. He devises the estate to trustees, in trust for the orphan asylum society, to be applied to the charitable purposes for which the association was established. His object was not to benefit the society, but through it to apply the estate to the charitable purposes for which the society was organized. The society itself is a trustee, and has a trust to perform which a court of equity would undoubtedly enforce. It is a devise to trustees for the use of the society, as trustees for certain charitable purposes. Suppose the corporation to be dissolved by the expiration of its charter, it never could have been the intention of the testator that these funds should be diverted from the charitable purposes to which he devoted them; and a court of equity never could permit it. If the corporation should, by dissolution or otherwise, become incompetent to execute the trust I see nothing to distinguish the case from that of the ordinary one of a failure of the trustee, in which the court would act by the appointment of another.

Again, suppose the powers of the corporation to be enlarged by a statute authorizing it to do banking or insurance business, in addition to the charitable operations for which it was first incorporated, will it be contended that it was the intention of the testator that these funds should be used, or that the law

would permit them to be used in such banking or insurance operations, instead of being applied to the charitable purposes designated in the will? I apprehend not. If it is granted, then, that the corporation itself had a trust to execute under this will, it is a case not within the statute of uses; for that statute can only execute the first use, which, in this case, would vest the estate in the corporation, unincumbered by any trust for charitable purposes, and contrary to the plain intention of the testator.

A trust is a use not executed by the statute; and the author of the Touchstone remarks, p. 507, n. 1, that "one of the modes of creating a trust is said to be where lands are limited to the use of A., in trust, to permit B. to receive the rents and profits; for the statute can only execute the first use." The conclusions which follows my view of the case are, that the devise of the real estate in question was not to the corporation directly, but to the executors, for the use of the corporation, upon the contingency which has happened, to be appropriated to certain charitable purposes; that under the statute of wills there is a mere incapacity in corporations to take lands by devise, and not a prohibition against their taking.

That a use was devisable at common law before the statute of wills; and therefore that this corporation may take a use by devise, not being prohibited by statute from taking either a use or the land itself. That the use in this case is not such as could be executed by the statute of uses; or if it is, that the operation of the statute would not invalidate the devise, but vest the estate in the corporation.

If these propositions are established, it follows that the respondents are entitled to the estate in question; and that the decree of the court of chancery is at least substantially correct.

BURBOWS, GARDINER, HAIGHT, McCALL, and SMITH, senators, concurred that the decree should be affirmed.

Decree of reversal as to the real estate.

DEVISES TO CORPORATIONS.—The doctrine that a devise of land to a corporation is void, as held in the foregoing decision, is approved in *Seminary of Auburn v. Childs*, 4 Paige, 422; *Kuypers v. Reformed Dutch Church*, 6 Id. 574; *Van Kleeck v. Reformed Dutch Church*, Id. 621; *Attorney-general v. Reformed Protestant Dutch Church*, 33 Barb. 313; *McCaughal v. Ryan*, 27 Id. 385; and *Bascom v. Albertson*, 34 N. Y. 584. So, whether the devise is direct or indirect: *King v. Rundle*, 15 Barb. 150. But in the absence of statutory restrictions a corporation may take and hold land: *Champlain etc. R. R. Co. v. Valentine*, 19 Barb. 487. That corporations might always, at common law.

take bequests of such personal property as they might acquire by purchase, was held referring to the principal case as authority, in *Williams v. Williams*, 8 N. Y. (4 Seld.) 530, and *Sherwood v. American Bible Society*, 1 Keyes, 564. The opinion of Jones, Chancellor, that a devise in trust for a corporation is valid is reviewed and commented on at length by Hoffman, Asst. V. C., in *Wright v. Trustees M. E. Church*, 1 Hoff. Ch. 227, and by Comstock, C. J., in *Downing v. Marshall*, 23 N. Y. 366. In the latter case a devise of land to a corporation was held void, but at the same time it was decided that a power given in the will to executors to sell realty and divide the proceeds between certain corporations was valid.

CHARITABLE USES.—This subject is fully discussed in the note to *Dashiell v. Attorney-general*, 9 Am. Dec. 578. The opinion of Jones, Chancellor, on this point in the principal case is referred to with approval in *Levy v. Levy*, 33 N. Y. 134, and *Bascom v. Albertson*, 34 Id. 584. So, the position taken by the chancellor as to the jurisdiction of chancery to enforce charitable trusts is approved in *King v. Woodhull*, 3 Edw. Ch. 87; *Kinskern v. Lutheran Churches*, 1 Sand. Ch. 562; *De Barante v. Gott*, 6 Barb. 498; *Robertson v. Bullions*, 9 Id. 80.

REPEALS BY IMPLICATION.—See, on this point, the note to *Towle v. Marrett*, 14 Am. Dec. 209. The doctrine of the principal case that repeals by implication are not favored, and that a statute is not to be regarded as repealed by a subsequent statute unless the two are wholly irreconcilable, is approved in *People v. Guild*, 4 Denio, 552; *People v. Deming*, 1 Hilt. 275; S. C., 13 How. Pr. 445. *Morgan v. Leland*, 1 Code Rep. 124; *Williams v. Potter*, 2 Barb. 320; *Van Rensselaer v. Snyder*, 9 Id. 308; *Vallance v. Bausch*, 28 Barb. 643; S. C., 17 How. Pr. 253; 8 Abb. Pr. 377; *Adams v. Perkins*, 25 How. Pr. 371; *Mayor etc. of New York v. Walker*, 4 E. D. Smith, 267. And where parts of the same statute are apparently repugnant to each other they should be construed so that both may operate if possible: *Walton v. Walton*, Deady, 605, citing the principal case.

CASES
IN THE
SUPREME COURT
OF
NEW YORK.

ORSER v. STORMS.

[9 COWEN, 687.]

POSSESSION TO MAINTAIN TRESPASS FOR CHATTELS.—Actual or constructive possession is necessary to maintain trespass for taking chattels.

CONSTRUCTIVE POSSESSION IS, when one has such a right as to be entitled to reduce goods to actual possession at any time.

OWNER OF CATTLE LOANED to another for an indefinite time, who retains the right of property therein, may maintain trespass for taking them or their increase from the borrower's possession, though that possession may have been continued for many years.

TO JUSTIFY, AS FOR A DISTRESS DAMAGE FEASANT, the defendant must show actual possession of the land trespassed upon.

PURCHASER OF LAND UNDER A DECREE IN CHANCERY MAY ENTER peaceably and take possession, and may then distrain cattle doing damage on the premises.

TRESPASS for taking and converting three cows and a calf. Plea, the general issue, with notice that the cattle were distrained, damage feasant, impounded and sold, etc. It appeared that two of the cows and the calf were of the increase of two cows loaned by the plaintiff to his daughter seventeen years before, the method of a loan being used to secure the property from the daughter's husband, a man of intemperate habits. The old cows and their young had continued in the possession of the daughter and her family ever since the loan, being used and exchanged for others with the plaintiff's concurrence. The old cows were killed by the husband, and one of them was sold by the plaintiff's direction, and another cow purchased with the proceeds. The other cow taken by the defendant was loaned to the daughter about three years ago. The defendant distrained

the cattle July 17, 1824, as damage feasant on land, of which he claimed to be owner and possessor, and afterwards caused them to be sold. A motion by the defendant for a nonsuit, on the ground that the cattle were in his possession, and not in the plaintiff's, was overruled; and the judge further decided that the plaintiff had shown title to the two cows and calf raised by the daughter. For the defendant, it appeared that he purchased and received a conveyance of the land on which the cattle were taken, June 1, 1824, at a sale by a master in chancery, under a decree against the plaintiff and his son-in-law; that he entered peaceably, July 1, 1824, without being forbidden or resisted by any one, and at the time and since had several times turned his horse upon the land, and had authorized others to do so, and had once turned cattle off the premises; and that he had demanded possession from the plaintiff's daughter, which was refused. There was no house on the land. The plaintiff's son-in-law had been in possession seventeen years before and up to the defendant's entry. The judge charged the jury that the defendant had shown a right of possession, but no actual possession which would justify the distraint. Verdict for the plaintiff. Motion for a new trial by the defendant.

R. R. Voris, for the motion, insisted: 1. That the plaintiff had not shown title to the increase of the two cows first loaned, but that they belonged to the hirer, unless it was otherwise agreed: Cowen's Treat. 160; 8 Johns. 435. 2. That the defendant had a right to enter and take possession: *McDougall v. Sitcher*, 1 Johns. 42; *Taylor v. Cole*, 3 T. R. 292; *Hyatt v. Wood*, 4 Johns. 150 [4 Am. Dec. 258]; Rol. Ab. 738.

A. Ward, contra, argued: 1. That the plaintiff had constructive possession sufficient to maintain trespass: *Putnam v. Wyley*, 8 Johns. 432 [5 Am. Dec. 346]; 1 T. R. 180, 190, 12; 2 Saund. 47, a, c, d, k; 2 Bulst. 268; Bac. Abr., Execution (H), 1. 2. That the defendant had not actual possession, nor a right to take possession without an ejectment.

By Court, SAVAGE, C. J. The first question to be considered is, whether the plaintiff had such a property in the cattle as to be able to maintain trespass. For this purpose, he must have had the actual or constructive possession at the time; and the latter is, when he has such a right as to be entitled to reduce the goods to actual possession at any time: 8 Johns. 435; Bac. Abr., Trespass (C) 2; 1 T. R. 480. As to one of the cows there is no question, and as to the residue, he does not seem ever to

have relinquished his property; nor had his son-in-law the use of the cows for any specific time. He, no doubt, intended the cows for the use of his daughter, but did not mean to place them where her husband or his creditors could dispose of them. He acted according to the dictates of humanity, and will be protected by law while he retains the right of the property in himself, as that draws after it the right of possession. In my opinion, the plaintiff had a right to bring this action, and must recover, unless the defendant had a right to distrain the cattle. To justify as for a distress damage feasant, the defendant must show that he had actual possession of the land trespassed upon. That he had the legal title as against the plaintiff there is no doubt. Had he a right to take possession himself, or should he be driven to his action of ejectment? In the case of *Taylor v. Cole*, 3 T. R. 292, to an action of trespass the defendant pleaded that by virtue of a *fi. fa.*, he sold the interest in a certain term in the opera house to T. H., who afterwards entered into the house, the door being open, and peaceably and quietly expelled the plaintiff. To this plea the plaintiff demurred, and Lord Kenyon says: "It is true that persons having only a right, are not to assert that right by force; if any violence be used, it becomes the subject of a criminal prosecution. The question is, whether a person having a right of possession may not peaceably assert it, if he do not transgress the laws of his country. I think he may; for a person who has a right of entry, may enter peaceably, and, being in possession, may retain it, and plead that it is his soil and freehold."

The case of *Taunton v. Costar*, 7 T. R. 427,¹ was an action of replevin. The defendant was tenant from year to year. The landlord (the plaintiff) gave notice to quit, but the defendant retained possession after the end of the year. The plaintiff entered, and put his cattle upon the *locus in quo*; and the defendant distrained, upon which the plaintiff brought replevin. Lord Kenyon said: "The case is too plain for argument. Here is a tenant from year to year, whose term expired upon a proper notice to quit, and because he holds over in defiance of law and justice, he now attempts to convert the lawful entry of his landlord into a trespass. If an action of trespass had been brought it is clear that the landlord could have justified under a plea of *liberum tenementum*."

This case is very much like the present. It has been decided, that, under a sale by a sheriff upon *fi. fa.*, the tenant becomes

1. *Taunton v. Costar*, 7 T. R. 431.

quasi tenant at will to the purchaser. The same reason holds in case of a sale by a master in chancery. They are both judicial sales. The defendant then was landlord to the son-in-law, and entered peaceably, after the tenant's interest had expired. *Taunton v. Costar* shows that no action of trespass could be sustained against the defendant, nor had the tenant a right to distrain the defendant's cattle when he had put them in the lot. In this court, too, there is abundant authority to justify the entry of the defendant. The case of *McDougall v. Sticher*, 1 John. 40,¹ decides that the purchaser of real estate under a *fi. fa.* may enter peaceably, although the defendant's property is on the premises, and they are occupied by the defendant's servants. In that case the servants of the former owner occupied the shop in the day and locked it at night. The next morning the purchaser was in possession, and the court said that a purchaser at a sheriff's sale may enter upon the property left in the situation this was by one who was defendant in the judgment; that he may retain the possession and plead it to be his soil and freehold, to any suit brought by the debtor. In the case of *Hyatt v. Wood*, 4 Johns. 150 [4 Am. Dec. 258], the language of the court is still stronger, and justifies the idea that, as between the parties, the landlord may enter by force upon a tenant at sufferance and turn him out, though, as between the landlord and the people, he would be subject to an indictment: *People v. Nelson*, 13 Johns. 340.

The judge at the trial of this cause was of opinion that the defendant had not such a possession, in fact, as would authorize the distress. *Taunton v. Costar*, I think, shows that he must be considered in possession. He had, in fact, taken all the possession the property was susceptible of, and was the only person lawfully in. He was, therefore, authorized to distrain. In my judgment, the plaintiff can not recover, and a new trial must be granted.

New trial granted.

POSSESSION TO MAINTAIN TRESPASS IN CASES OF CHATTELS.—The gist of the action of trespass, whether real or personal property be concerned, "is the injury done to the plaintiff's possession:" 2 Greenl. Ev. sec. 613; Cooley on Torts, 436. Although in the case of chattels (which alone it is proposed here to consider), a declaration in trespass which fails to allege that the plaintiff has property in the thing taken or injured, is bad on demurrer: *Ilite v. Long*, 6 Rand. 457, *post*, yet the principal subject of inquiry is as to the nature of the possession upon which the action is founded.

1. 1 John. 42.

ACTUAL OR CONSTRUCTIVE POSSESSION NECESSARY.—In order to maintain this action for the taking of a chattel or for an injury thereto, it must appear that the plaintiff had, at the time of the wrong complained of, either actual or constructive possession: *Bac. Abr.*, Trespass, C. 2; 1 *Waterman on Trespass*, sec. 521; *Cooley on Torts*, 436; 2 *Greenl. Ev. sec.* 614; *Smith v. Milles*, 1 T. R. 475; *Ward v. Macauley*, 4 Id. 489; *Bell v. Monahan*, *Dudley* (S. C.) 38; *Hume v. Tufts*, 6 *Blackf.* 136; *Woodruff v. Halsey*, 8 *Pick.* 333; *Muggridge v. Eveleth*, 9 *Met.* 233; *Lunt v. Brown*, 13 *Me.* 236; *Cannon v. Kinney*, 3 *Scam.* 9; *Ginsberg v. Pohl*, 35 *Md.* 505; *Wilson v. Martin*, 40 *N. H.* 88; *Lewis v. Carraw*, 15 *Pa. St.* 31; *Weitzel v. Marr*, 46 *Id.* 463; *Corfield v. Corgett*, 4 *Wash. C. C.* 371. The principle is thus stated in *Gwillim's note* to *Bac. Abr.*, Trespass, C. 2: "To entitle a man to bring trespass, he must, at the time when the act was done which constitutes the trespass, either have the actual possession in him of the thing which is the object of the trespass, or he must have a constructive possession in respect of the right being vested in him."

The nature of the possession necessary to sustain the action is very clearly explained also by *Fowler, J.*, delivering the opinion of the court in *Wilson v. Martin*, 40 *N. H.* 88, where he says: "The gist of trespass to personal property is the injury done to the plaintiff's possession. The substance of the declaration is that the defendant has forcibly and wrongfully injured property in the possession of the plaintiff. To maintain the action it is absolutely essential that the plaintiff should have had, at the time of the alleged injury, either actual or constructive possession of the property injured. His possession is constructive when the property is either in the actual custody and occupation of no one, but rightfully belongs to himself, or when it is in the care and custody of his servant, agent, or overseer, or in the hands of a bailee for custody, carriage, or other care or service, as a depositary, mandatory, carrier, borrower, or the like, where the bailee or actual possessor has no vested interest or right to the beneficial use or enjoyment of the property, or to retain it in his possession, but the owner may take it into his own hands at pleasure. But where the general owner has parted with the actual possession in favor of one who enjoys the exclusive right of present possession and enjoyment, retaining to himself only a reversionary interest, the possession is that of the lessee or bailee, who alone can maintain an action of trespass for a forcible injury to the property: 1 *Chit. Pl.* (7 ed.) 188, 195; 2 *Greenl. Ev.* secs. 613, 614, 616, and authorities cited; *Clark v. Carlton*, 1 *N. H.* 110; *Poole v. Symonds*, *Id.* 289 [8 *Am. Dec.* 71]; *Heath v. West*, 28 *Id.* 101; *Moulton v. Robinson*, 27 *Id.* 550; *Marshall v. Davis*, 1 *Wend.* 109; *Nash v. Mosher*, 19 *Id.* 431; *Newhall v. Dunlap*, 14 *Me.* 180; *Gay v. Smith*, 38 *N. H.* 171."

Since actual or constructive possession is necessary to support the action, it follows that trespass will not lie where there is a mere right to obtain possession by action or other legal proceeding. Thus a widow can not maintain trespass against the administrator of her deceased husband for refusing to set apart to her certain goods of the estate, as required by statute, and for disposing of them in course of administration: *Neeley v. McCormick*, 25 *Pa. St.* 255. Nor can the action be founded upon a demand and refusal after the taking of the goods: *Imlay v. Sage*, 5 *Conn.* 489.

The division of possession into actual and constructive, when regarded as the foundation of an action of trespass, is the one which is usually adopted. *Mr. Justice Cooley*, however, has a different classification. He says: "The possession disturbed by a trespass may be either: 1. That of a general owner of the property; or, 2. That of one having a special property therein, as mort-

gatee, bailee, or officer; or, 3. That of a mere possessor, by which is meant one who has a peaceable possession, but who shows in himself no other right:" Cooley on Torts, 436. The third subdivision here mentioned might seem to indicate that in the opinion of the distinguished author a "mere possessor" of a chattel, who does not assert or pretend that he has any property in it, can maintain trespass for the disturbance of his possession of it. But this is contrary to the doctrine laid down in *Hite v. Long*, 6 Rand. 457, *post*, on the authority of Bac. Abr., Trespass, I, that a declaration in trespass which does not claim that the thing taken is the plaintiff's property is bad on demurrer. So in *Cannon v. Kinney*, 3 Scam. 9; *Perkins v. Weston*, 3 Cush. 549, and in many other cases, it is held that possession under a claim of property, either general or special, is necessary to maintain trespass. The object of the action is to vindicate the possession of property, but by this is meant the possession of it as property, the property of the plaintiff. A "mere possessor" may, in certain cases, maintain the action, but in theory, at least, the law regards him as owner, and merely accepts his possession as sufficient proof of ownership; and this is perhaps what is meant by the classification above referred to.

ACTUAL POSSESSION SUFFICIENT.—It is well settled that, as against a mere stranger, or wrong-doer, who can show no better right, bare possession is sufficient to maintain trespass for an injury to, or the taking of, a chattel: 1 Hilliard on Torts, 518; 2 Greenl. Ev. sec. 614; 1 Waterman on Trespass, sec. 515; *Potter v. Washburn*, 13 Vt. 558; *Hoyt v. Gelston*, 13 Johns. 141; S. C., Id. 561; *Hendricks v. Decker*, 35 Barb. 298; *Odiorne v. Colley*, 9 Am. Dec. 39; S. C., 2 N. H. 66; *Pickering v. Coleman*, 12 N. H. 148; *Boston v. Neat*, 12 Mo. 125; *Brown v. Ware*, 25 Me. 411; *Staples v. Smith*, 48 Id. 470. Thus, a naked bailee from whose actual and exclusive possession a chattel is wrongfully taken may maintain the action: *Carson v. Prater*, 6 Cold. 565. So a tenant of a farm upon which the property is when taken: *Gilson v. Wood*, 20 Ill. 37. And actual possession is sufficient against a wrong-doer, or one who can show no better title, though it be "without the consent, or even adverse to the real owner:" *Miller v. Kirby*, 74 Ill. 242. It is no defense to show title in a third person, unless the defendant connects himself therewith: *Hamner v. Wilsey*, 17 Wend. 91; *Sickles v. Gould*, 51 How. Pr. 22; *Crawford v. Bynum*, 6 Cold. 381. Thus, in *Nelson v. Cherrill*, 1 Moore & S. 452; S. C., 7 Bing. 663; 8 Id. 316, a defendant in trespass having failed to make out title in himself, sought to defend under the title of a third person, but the court would not permit it. "I think," said Lord Chief Justice Tindal, "that would be admitting a trespasser to clothe himself with rights which the law does not allow him." But if the defendant can connect himself with the title of such third person he may protect himself thereunder against one who shows only a bare possession: *Hutchinson v. Lord*, 1 Wis. 286.

POSSESSION ACQUIRED TORTIOUSLY is sufficient against a stranger who can show no better right: 2 Greenl. Ev., sec. 617, and cases cited; *Cruier v. Pix*, 2 Head. 398. Thus, where the defendant, an officer who had seized the property on execution, attempted to show, under the general issue, that the plaintiff's possession was acquired by a fraudulent sale from the execution debtor, the execution having been excluded on account of a variance between it and the plea of justification, the court would not permit him to do so: *Harrison v. Davis*, 2 Stew. 350. To the same effect is *Demirk v. Chapman*, 11 Johns. 132. So in *Wustland v. Potterfield*, 9 W. Va. 438, possession was held sufficient evidence of title to maintain trespass against mere strangers, where the defendants offered certain admissions of the plaintiff's grantor to

prove that the transfer was fraudulent. So in *Fletcher v. Cole*, 26 Vt. 170, it was held that one tortfeasor may always recover in trespass against a subsequent tortfeasor who shows no right whatever. But possession acquired by an unlawful sale can never enable one to maintain trespass against the true owner: *Reed v. Lucas*, 42 Tex. 529. Possession under a void assignment, with the consent of the true owner, is sufficient title against a mere stranger: *Barker v. Chase*, 24 Me. 230. One who purchases an article on Sunday, in violation of law, and obtains possession from the vendor on a subsequent day, may bring trespass against an officer seizing it under an execution against the vendor: *Smith v. Bean*, 15 N. H. 577. In that case, Parker, C. J., delivering the opinion of the court, said: "It is generally said of such an illegal contract that it is void: *Drury v. De la Fontaine*, 1 Taunt. 175; *Allen v. Deming*, 14 N. H. 133, 137, 138, and cases there cited; *Lewis v. Welch*, Id. 294, 298. If this were so, and the contract, in the broad sense of the term, were void, no property would pass by it; the vendor might reclaim the property at will, and being his property it would be subject to attachment and levy by his creditors, in the same manner as if the attempt to sell had never been made. But this is not what is intended by such phraseology. The transaction being illegal, the law leaves the parties to suffer the consequences of their illegal acts. The contract is void, so far as it is attempted to be made the foundation of legal proceedings. The law will not interfere to assist the vendor to recover the price. The contract is void for any such purpose. It will not sustain an action by the vendee upon any warranty or fraud in the sale. It is void in that respect. The principle shows that the law will not aid the vendor to recover the possession of the property, if he have parted with it. The vendee has possession, as of his own property, by the assent of the vendor; and the law leaves the parties where it finds them. If the vendor should attempt to retake the property, without process, the law finding that the vendee had a possession which could not be controverted, would give a remedy for the violation of that possession. When, then, it is said that the contract is void, the language is used with reference to the question whether there is any legal remedy upon it: See *Fennell v. Ridler*, 5 Barn. & C. 406, opinion of Bayley, J."

SERVANT IN POSSESSION CAN NOT MAINTAIN.—One who is in possession of a chattel as a mere servant can not maintain trespass, for his possession is that of his master or employer. Possession in that character can not warrant a presumption of ownership. On this principle it was held in *Perkins v. Weston*, 3 Cush. 549, that the school committee of a town could not maintain trespass for the taking of the school registers by other persons claiming also to be the school committee, for the reason that they were merely the servants of the town. Metcalf, J., delivering the opinion of the court in that case, said: "A party can not maintain an action of trespass for taking and carrying away chattels from him, unless he had actual or constructive possession thereof, at the time of the taking, and also a general or qualified property therein. As against a mere stranger and wrong-doer, possession is sufficient evidence of property. But the possession of a servant is the legal possession of the master only; and when chattels are taken from the servant, they are taken from the possession of the master, who alone can maintain trespass and recover damages against the taker: *Gouldsb.* 72, pl. 18; *Bloss v. Holman*, Owen, 52; 2 Bl. Com. 396; *Hammond*, N. P. 222; 3 Steph. N. P. 2636. See, also, *Addison v. Round*, 6 Nev. & M. 422. So the possession of an officer of a corporation is the possession of the corporation; and when chattels belonging to the corporation are taken from him, they are taken from the

possession of the corporation, which alone is entitled to sue for and recover damages for the taking, unless the officer is authorized by statute to sue in his own name. In the present case, we are of opinion that the school committee had no property, general or qualified, in the school registers, and no such possession thereof, distinct from the possession of the town, as is required by law in order to enable them to maintain this action and recover damages to their own use; but that they had only the custody or charge of the registers, as officers and servants of the town."

But in *Moore v. Robinson*, 2 Barn. & Ald. 817, it was held that the master of a fly-boat, employed to navigate her for weekly wages, and having other persons under him to work the vessel, had such an interest in her that he could maintain trespass against one who cut the rope by which she was towed.

ACTION BY BAILEE.—A bailee of chattels may maintain trespass for the taking of them against any one but the owner; and if he have an interest and the taking is tortious, he may maintain the action even against the owner: *Jones v. McNeil*, 2 Bailey (S. C.) 466; *Burdiet v. Murray*, 3 Vt. 302; *Cowing v. Snow*, 11 Mass. 415; *Neff v. Thompson*, 8 Barb. 213. Thus, where certain skins were delivered by the owner to the plaintiffs to be manufactured into morocco, and turned over to the owner at the plaintiffs' shop at so much a piece, and the owner afterwards turned them out to a creditor, who caused them to be attached, it was held that the plaintiffs could maintain trespass for such taking: *Burdiet v. Murray*, 3 Vt. 302. So, where sheep are taken from a bailee having a lien for keeping them, either the owner or the bailee may maintain trespass: *Neff v. Thompson*, 8 Barb. 213. Where a horse is left with one to be kept until his keeping is paid for, he may recover in trespass to the extent of his lien: *Outcall v. Durling*, 25 N. J. L. (1 Dutch) 443. An agister for keeping cattle, it was held in *Bass v. Pierce*, 16 Barb. 595, may maintain trespass for the taking of them, even though he has no lien for keeping them. In *Cowing v. Snow*, 11 Mass. 415, a master of a vessel having made a purchase of flour for one Cowing, and having a lien thereon for an advance made to complete the purchase, and also for the freight, delivered the flour to Snow, with instructions not to give it up to Cowing until payment was made. Cowing took the flour from the wharf where it was lying, without having paid charges, and it was held that Snow could maintain trespass against him. A shopkeeper taking goods on sale or return, has a special property coupled with possession, and may maintain trespass for the taking of such goods: *Colhoill v. Reeves*, 2 Camp. 575. A consignee who has made advances can maintain trespass against an officer attaching the goods for the consignor's debt: *Brownell v. Carnley*, 3 Duer, 9. A defendant in execution having been constituted the bailee of the sheriff to keep the goods levied on, may maintain trespass for an injury to his possession by the taking of the goods: *Browning v. Skillman*, 24 N. J. L. 351.

OFFICER HOLDING UNDER EXECUTION OR OTHER WRIT.—An officer in possession of goods by virtue of a levy of an execution or attachment has such a special property therein that he can maintain trespass for the taking or other injury of such goods: *Whitney v. Ladd*, 10 Vt. 165; *Sewell v. Harrington*, 11 Id. 141; *Gibbs v. Chase*, 10 Mass. 125. So, though property enough is left in his hands to satisfy the writ: *Marsh v. White*, 3 Barb. 618. Nor is the right of an officer, who has attached goods to maintain trespass for the taking of them, affected by the fact that the debtor has made an assignment to the creditor in discharge of the judgment: *Fletcher v. Cole*, 28 Vt. 170. And in an action against a stranger, the officer need not show a judgment as

the basis of the execution: *Barker v. Miller*, 6 Johns. 195. But if the process is void, the officer can not maintain trespass for the goods levied upon: *Earl v. Camp*, 16 Wend. 562; nor if he has abandoned the goods: *Taintor v. Williams*, 7 Conn. 271. It is no defense to an action by an officer for the taking of goods upon which he has levied an execution, that the goods were mortgaged or belonged to a third person, or were exempt from execution: *Gibbs v. Chase*, 10 Mass. 125. Nor is the officer deprived of the right to maintain trespass for the taking of goods attached by him by the fact that the attaching creditor has made an agreement releasing him from liability: *Huntley v. Bacon*, 15 Conn. 267. Where the officer delivered the goods to a bailee, taking his receipt, and the latter delivered them to another person for safe keeping, and they were taken from such other person in another state, it was held that the officer might bring trespass for such taking: *Brownell v. Manchester*, 1 Pick. 232. Where a sheriff delivered property to receptors, taking their agreement to redeliver it at a time and place specified, and an authority, in case of their failure to do so, to enter judgment by confession against them, it was held, on a removal of the goods by the defendant in execution before the expiration of the time for their redelivery, the sheriff could not maintain trespass against him: *Lewis v. Carsaw*, 15 Pa. St. 31. Before the levy of an execution, but after the lien thereof has attached, the sheriff can not maintain trespass against one taking the debtor's goods under a claim of right: *Cluley v. Lockhart*, 59 Pa. St. 376. As said by Mr. Justice Agnew in the case just cited: "The plaintiff had by this writ only a right to levy, but no actual possession. He was not an owner, but armed merely with a power, and therefore can maintain no action founded upon an injury done to the possession."

The special property acquired in chattels by the levy of an execution does not inure to the plaintiff in execution, nor give him any possession or right of possession by virtue of which he can maintain trespass for a subsequent taking of the goods, as by a landlord distraining for arrears of rent. That right belongs solely to the officer: *Taylor v. Manderson*, 1 Ash. 130.

A deputy sheriff is in some cases spoken of as the mere servant of the sheriff, and it is consequently held that when he attaches property, or seizes it in execution, his possession is merely that of his superior and does not authorize him to maintain for a taking of such property: *Tervoilliger v. Wheeler*, 35 Barb. 620. But in other cases it is held that the deputy, by reason of his ultimate liability to the sheriff, may maintain trespass for such taking: *Stanton v. Hodges*, 6 Vt. 64.

A MORTGAGOR OF A CHATTEL MAY MAINTAIN trespass against a stranger who wrongfully takes it from his possession, and the title of the mortgagor is no defense to the action: *Hamner v. Wisely*, 17 Wend. 91. And where the owner of property mortgages it for another's debt, he may nevertheless maintain trespass for a seizure of it for such other person's debt: *Cram v. Bailey*, 10 Gray, '87. One who has made a conveyance of property in trust to secure a debt, but has stipulated that he is to have possession in conjunction with the trustee, and to deal with the property as his own, may maintain trespass against an officer seizing it under an execution against the creditor for whose benefit the conveyance was made: Thus, in *Miller v. Kirby*, 74 Ill. 242, it appeared that the plaintiff had purchased the stock of a jewelry store from certain persons, and had given a trust deed of the property to secure an unpaid balance of the purchase-money. The trust deed provided that the plaintiff was to have possession of the store and stock in conjunction with the trustee, and was to have "full right, power, and authority to carry on the

business of said store in his own name, to have his signs out as such owner, to sell the goods, etc., to receive the proceeds, etc., and to have the management of said business in the same manner as a retail jewelry business is generally carried on." A part of the stock was subsequently levied on under an execution against the parties from whom the plaintiff purchased, and it was held that the trustee's possession was merely constructive while the plaintiff was in actual possession, and that the latter could maintain trespass for such seizure.

CREDITORS IN POSSESSION of property of their debtor, under a contract allowing them to manage and control it until their claim is paid, may have trespass against an officer attaching it as the debtor's property: *Hove v. Keeler*, 27 Conn. 538. Where a large quantity of brick had been sold to a creditor, to be taken out of an unfinished kiln, and he had possession of the kiln, it was held that he had sufficient possession of the brick to enable him to bring trespass for the taking of them: *Crofoot v. Bennett*, 2 N. Y. 258. A mortgagee in possession may have trespass against an officer attaching the mortgaged goods as the mortgagor's property, although the mortgage is afterwards declared void as being in fraud of the bankrupt law; but the invalidity of the mortgage may be shown for the purpose of reducing the verdict to nominal damages: *Perry v. Chandler*, 2 Cush. 237. A second mortgagee in possession may sue in trespass for the taking or injury of the goods, although a prior mortgage is still unsatisfied: *White v. Webb*, 15 Conn. 302.

ACTUAL POSSESSION, WHAT CONSTITUTES.—The character of the actual possession which is necessary to maintain an action of trespass for the taking of chattels, depends very materially upon the nature of the property. The possession which is commonly had of the particular kind of property in question, is sufficient. Thus in the case of a mare, of which the plaintiff had no general ownership, but which he was accustomed to use and work, sometimes keeping her up and sometimes permitting her to run out with his other stock, it was held that although at the time of an alleged trespass the mare was not within the plaintiff's inclosure, he nevertheless had such actual possession as to be able to sue for such trespass: *Boston v. Neat*, 12 Mo. 125. Napton, J., delivering the opinion of the court in that case, said: "I do not lose the possession of my horse whenever he is turned loose on the prairie. A constructive possession follows the title, but an actual possession is *prima facie* evidence of title." An actual possession is a phrase which must be understood with reference to the subject. If the property be a living animal, capable of locomotion and accustomed to run at large, subject only to be caught at the will of the owner, exercising the usual acts of ownership over such an animal must be understood as such a possession as will maintain an action."

Nor is it necessary that the plaintiff, in an action of trespass for an injury to personal property, should have been in the exclusive possession of the place in which such property was kept in order to have had exclusive possession of the property itself. A man may have exclusive actual possession of a wagon standing in a yard occupied in common by himself and another person: *Potter v. Mather*, 24 Conn. 551.

BUT WHERE THE RIGHT DEPENDS SOLELY ON ACTUAL POSSESSION, there must, at least, be such possession as the subject-matter is capable of. Thus, in the case of fixtures attached to the freehold, there can be no possession of them as chattels unless the party, not being owner of the land, has reduced them to possession as such. Hence, where an auctioneer was put in posses-

sion of a house for the purpose of selling certain fixtures attached thereto, and the right of removing the same, it was held that he had not such possession of the fixtures as to be able to maintain trespass for the taking of them: *Davis v. Danks*, 3 Exch. 435; S. C., 18 L. J. (Exch.) 213. In a case of wheat growing upon land, it was held, in *Algood v. Hutchins*, 3 Murph. N. C. 496, where neither party had title to the land, that the plaintiff, having cut the wheat, had sufficient possession to maintain trespass against the defendant for hauling it away. But in *McGahey v. Moore*, 3 Ired. L. 35, where two persons respectively claimed title to, and cultivated, a crop of corn in a field which both claimed, but to which neither had title nor actual possession, and one of them gathered the corn, piled it in heaps in the field, and left it for a week, it was held that he had not acquired sufficient possession to maintain trespass against the other for taking it away.

ANIMALS FERÆ NATURE.—To constitute such possession of animals *feræ nature*, as to enable the possessor to maintain trespass for them, they must be brought into his actual power: 2 Greenl. Ev. sec. 620, and cases cited. Where one was pursuing a fox, and another person in his sight killed and carried away the animal, it was held that the former had not such possession as to be able to maintain trespass: *Pierson v. Post*, 2 Am. Dec. 264. Where the plaintiff, being engaged in fishing, cast a seine around a shoal of mackerel, with the exception of a small opening which the seine did not quite fill up, and through which in the opinion of experienced persons the fish could not escape, and the defendant entered with his boat and took the fish, it was held that the plaintiff's possession was not complete so as to enable him to maintain trespass: *Young v. Hichens*, 1 Dav. & Meriv. 592; S. C. 6 Q. B. (6 Ad. & El. N. S.) 606. In that case, Lord Denman, C. J., used the following language: "It certainly results from the evidence in this case that the fish were reduced to a condition in which it was in the highest degree probable that the plaintiff would become possessed of them. But it is equally certain that he had not become possessed. Whether the necessary possession be rightly described by the word *custodia* or *occupatio*, I think it is not attained until the plaintiff has brought the animals into his actual power. It may be, indeed, that the defendant has committed a tortious act in preventing the plaintiff from completing his possession." But actual possession acquired by a wrongful act will not in such a case enable one to sue in trespass. Where a trespasser kills game on another's land it belongs to the owner of the land, and the trespasser acquires no title to it by his possession: *Blades v. Higgs*, 11 H. of L. Cas. (Clark), 621.

CONSTRUCTIVE POSSESSION TO MAINTAIN TRESPASS.—If the plaintiff in an action of trespass for the taking or injury of chattels, had not actual possession when the wrong was committed, he must have had constructive possession or the action will not lie; that is to say, he must have had a property in the thing and the right to immediate possession: 1 Waterman on Trespass, secs. 520, 521, 522; *Smith v. Miles*, 1 T. R. 475; *Woodruff v. Halsey*, 8 Pick. 333; *Brown v. Thomas*, 26 Miss. 335; *Howe v. Farrar*, 44 Me. 233, and cases cited at the beginning of this note. Constructive possession is thus defined by Parker, C. J., in *Woodruff v. Halsey*, 8 Pick. 333: "Constructive possession is where the general owner, although the chattel is in the actual possession of another, has the right to reclaim it immediately, the person in possession not being entitled to retain it against his will."

That the general owner who has such constructive possession may maintain the action is a settled doctrine of the law of trespass: 1 Waterman on Trespass, sec. 520; Bac. Abr., Trespass, C. 2; *Carson v. Noblet*, 6 Am. Dec.

554; *Butler v. Collins*, 12 Cal. 457. "Therefore," says Gwillim in his note to *Bac. Abr.*, *Trespass*, C. 2, "the lord may before seizure maintain trespass for an estray or wreck taken by a stranger. For the right is in the lord, and a constructive possession in respect of the thing being within the manor of which he is lord. So the executor has the right immediately on the death of the testator, and the right draws after it a constructive possession. The probate is a mere ceremony; for, when passed, the executor does not derive his right under the probate, but under the will; the probate is only evidence of his right, and is necessary to enable him to sue; but he may release, etc., before probate. But there seems to be no instance where a man who has a new right given to him, which, from reasons of policy, is so far made to relate back as to avoid all mesne incumbrances, shall be taken to have such a possession as to bring trespass for an act done before such right was given to him. Hence, trespass will not lie by the assignees of a bankrupt against a sheriff for taking the goods of the bankrupt in execution after an act of bankruptcy, and before the issuing of the commission, notwithstanding he sell them after the issuing of the commission, and after a provisional assignment and notice from the provisional assignee not to sell them."

Where one having a property in the thing taken or injured has the right at will to take it into his actual possession, it is enough: *Aikin v. Buck*, 1 Wend. 466; *Codman v. Freeman*, 3 Cush. 306. The owner of goods left locked up in an unoccupied house may bring trespass for taking them: *De Bruhl v. Parker*, 2 Brev. 406. The owner of land from which rails are taken may maintain trespass, his title to the land being sufficient, until rebutted, to show title to the rails and the right to possession: *Dorcey v. Patterson*, 7 Iowa, 420. So an owner of land leased to another may maintain trespass against a stranger entering and removing trees severed from the land, being entitled to their possession upon such severance: *Bulkley v. Dolbear*, 7 Conn. 232. On the other hand, one who has purchased leave to cut wood on another's land may bring trespass against a stranger who takes the wood so cut: *King v. Baker*, 25 Pa. St. 186. So where one has cut saw-logs, marked them, and left them on another's land: *Aikin v. Buck*, 1 Wend. 466. But a lessee leaving lumber on land at the end of his lease can not maintain trespass against a subsequent purchaser of the land who has entered into peaceable possession: *Weitzel v. Marr*, 46 Pa. St. 463. The owner of land let on shares may have trespass against an officer seizing his share of the crop, after a division, on an execution against the tenant: *Symonds v. Hall*, 37 Me. 354. A husband has property and right of possession in his wife's chattels that he alone can sue for a trespass done upon them: *Rawlins v. Rounds*, 27 Vt. 17.

AN EXECUTOR OR ADMINISTRATOR has such title and right to possession of the goods of the deceased as to be able to maintain trespass against one who takes them: *Patchen v. Wilson*, 4 Hill, 57. So where the trespass is committed before administration granted: *Hutchins v. Adams*, 3 Greenl. 174; *Tharpe v. Stallwood*, 5 Man. & Gr. 760. And see, to the same effect, Gwillim's note to *Bacon's Abridgment* quoted above.

OWNER IN POSSESSION BY AGENT.—Where a chattel is in the hands of an agent or servant of the owner, the latter may unquestionably maintain trespass for an injury thereto; for, as stated above, the possession of the agent or servant is that of the owner. Indeed, this is, properly speaking, actual rather than constructive possession by the owner. The right of the owner to maintain trespass in such a case is established by many decisions, only a few of which need be cited: *Thorp v. Burling*, 11 Johns. 285; *Mitchell v. Stetson*, 7 Cush. 435; *Gillett v. Ball*, 9 Pa. St. 13; *Thomas v. Snyder*, 23 Id.

515; *Burrows v. Stoddard*, 3 Conn. 160; *Craig v. Gilbreth*, 47 Me. 416. Thus the owner of a note delivered to an agent for collection may maintain trespass against one forcibly taking it from the agent: *Gillett v. Ball*, 9 Pa. St. 13. So where one gives money to his agent to buy wheat and manufacture it into flour, he may have trespass against an officer seizing the flour as the agent's property: *Thomas v. Snyder*, 23 Pa. St. 515. So where an owner of land employed one Shipley to cut timber and build a barn thereon, under a written contract, and while he was doing so, the timber cut and drawn for the purpose was attached for his, Shipley's, debt, it was held that the owner might sue in trespass: *Gallup v. Joselyn*, 7 Vt. 334. Williams, C. J., delivering the opinion in that case, thus stated the doctrine applicable to it:

"The general principle is that the ownership of personal property carries with it possession. The owner is constructively in possession. Where he parts with possession and use for a definite time, he cannot maintain trespass against any one who takes it during that time. Such was the doctrine laid down in the cases cited. Here was no parting with possession; the property all the while remained in the plaintiff. The possession of Shipley was that of an agent to manufacture for the plaintiff's use; and he had no other possession than he had of the team for drawing the same; nothing more than any hired man or agent has of property intrusted to him to use in the business of and for the benefit of the owner. If Shipley had converted it to any other use, he would have been immediately liable; and if any one took it from Shipley, while in the employ of the plaintiff in completing the job, such person would be immediately answerable to the plaintiff; and it would be a direct injury to the property of the plaintiff in the hands of his agent, and of course, an injury to the possession, for which the action of trespass is the appropriate remedy."

Nor is the principle affected by the fact that the person in whose hands the chattel is at the time of the injury is the agent of one who has only a special or qualified interest in the goods. Thus a receptor of property taken in execution, who has delivered it to an agent for safe keeping, may bring trespass against one who takes it from such agent: *Burrows v. Stoddard*, 3 Conn. 160. So, where a chaise hired for a specified purpose was injured by a stranger while in possession of the bailee's minor son and servant, it was held that the father might maintain trespass: *Boynton v. Turner*, 13 Mass. 391.

And it seems that the owner, or a purchaser from him, may maintain trespass even against the agent himself, if the latter asserts an exclusive right to the property, denying his principal's claim to it, and removes it without authority to a different place from that in which his duty as agent requires him to keep it. Thus, in *Trout v. Kennedy*, 47 Pa. St. 387, it appeared that the defendant was employed to stock and run a steam mill on one Dr. Brooks' land, to manufacture boards, lath, and shingles, etc., of which, on division, Brooks was to have half and the defendant half. The defendant, however, refused to divide certain boards manufactured under the contract, claimed them as his own, and removed them from the mill to another place, and it was held that trespass would lie against him at the suit of a purchaser on execution against Brooks. Strong, J., delivering the opinion, after remarking that if the plaintiff and defendant were not joint owners of the property the defense could not be maintained, said: "And that they were not, that the defendant had no interest in it as owner until after a division, is manifest from all the evidence. That the timber when standing was the sole property of Dr. Brooks, under whom the plaintiff claims, is a conceded fact, as well as that the defendant never acquired title to it, unless it was by virtue of the

agreement for its manufacture into lumber. Nothing in that, however, vested in him any interest so long as the lumber remained undivided. It simply constituted him the agent of the owner to cut the logs, haul them to the mill, saw them into boards, and place the boards in piles. The woodland was not leased to him, wood-leave was not sold, and he did not even acquire any term in the mill. He was permitted, required to use the mill, not to saw his own timber or that of the public, but to saw the logs of Dr. Brooks. True, when the lumber had been made he was required to give his principal one half after it had been divided. That was a provision for the payment of his own services. It was equivalent to an allowance by the principal to the agent of one half the product of his labor. The agreement will bear no other construction. It can not be said that the ownership of the property was transferred to Trout when the logs were cut, or when they were hauled to the mill, or when they had been sawed, nor even when the lumber was piled, never until a division was made. And that the defendant never allowed. The time never came, therefore, when he became half owner. In this aspect of the case, the defendant's proposition was not correct. Claiming the lumber as all his own, refusing to make any division, and removing it to a distant place under an assertion of exclusive right, constituted a trespass for which such an action would lie."

OWNER OF PROPERTY BAILED TO ANOTHER.—Where, as in the principal case, the owner of a chattel has gratuitously loaned it to another, but has the right to take it into his own possession whenever he pleases, it is settled that he has such a constructive possession as to enable him to maintain trespass for an injury to such chattel: *Cannon v. Kinney*, 3 Scam. 9; *Long v. Bledsoe*, 3 J. J. Marsh, 307; *Overby v. McGee*, 15 Ark. 459; *Walker v. Wilkinson*, 35 Ala. 725; *White v. Brantley*, 37 Id. 430; *Root v. Chandler*, 10 Wend. 110; *Lotan v. Cross*, 2 Camp. 464. "A mere gratuitous permission to a third person to use a chattel," says Lord Ellenborough, in the case last cited, "does not, in contemplation of law, take it out of the possession of the owner, and he may maintain trespass for any injury done to it while it is so used." The owner's immediate right of possession is the touchstone of the action. Where a horse is loaned for a particular journey, but is ridden farther, and is seized for the borrower's debt, the owner having the right to possession at the time, may sue in trespass: *Root v. Chandler*, 10 Wend. 110. If there is no stipulation as to the time for which the property is to remain in the bailee's possession, the owner may reclaim it at any time, and may, therefore, bring trespass for the taking or injury of it by a third person: *Walcot v. Pomeroy*, 2 Pick. 121; *Bradley v. Davis*, 14 Me. 44; *Dallam v. Filler*, 6 Watts. & S. 323. So, where the owner of a chattel lets it "until called for," he may bring trespass against one taking it from the bailee's possession without showing that he has "called" for it: *Staples v. Smith*, 48 Me. 470. So, though the borrower is to pay a reasonable rent for the use of the property: *Hart v. Hyde*, 5 Vt. 328. So, where one in consideration of support furnished to himself and family by a person with whom he lived, gave the latter the benefit of his labor and the use of a certain cow and her increase while the arrangement continued, but had the privilege of leaving at any time and taking the cow, it was held that he had such constant right to the possession of the animal as to be able to sue in trespass for an injury to her: *Freeman v. Rankins*, 21 Me. 446. Where the owner of goods leaves them with an auctioneer for sale, reserving the right to resume possession at pleasure, he may maintain trespass against one taking them from the auctioneer: *Gauche v. Mayer*, 27 Ill. 134. So, the owner of goods left with a commission merchant to "sell or

return on demand:" *Shloss v. Cooper*, 27 Vt. 623. So, where goods are consigned for sale on commission and the consignee becomes insolvent and has no lien for commissions on the goods, the owner may bring trespass against an officer seizing them as the consignee's property: *Hayward Rubber Co. v. Dunclder*, 30 Vt. 29. Indeed, it is held in *Holly v. Huggesford*, 8 Pick. 73, that the owner of goods consigned to a factor for sale and taken under an attachment against the factor, may bring trespass for them, notwithstanding the factor's lien, because the lien is merely personal and is forfeited by suffering the attachment. In that case Parker, C. J., said:

"The lien of a factor does not dispossess the owner until the right is exerted by the factor. It is a privilege which he may avail himself of or not, as he pleases. It continues only while the factor himself has the possession, and, therefore, if he pledges the goods for his own debt, or suffers them to be attached, or otherwise parts with them voluntarily, the lien is lost, and the owner may trace and recover them, or he may sue in trespass if they are forcibly taken; for his constructive possession continued, notwithstanding the lien. None but the factor himself can set up this privilege against the owner. It is a personal privilege of the factor, and can not be transferred; nor can the question upon it arise between any but the principal and factor: *Jones v. Sinclair*, 2 N. H. 321 [9 Am. Dec. 75]; *Daubigny v. Duval*, 5 T. R. 606."

In *Stanley v. Gaylord*, 1 Cush. 536, an action of trespass was sustained on the part of a bailor of goods against one taking possession under a mortgage from the bailee. So, in *Williams v. Lewis*, 3 Day, 498, an action by a bailor of goods was sustained against a purchaser from the bailee, it appearing that unfair means had been used by the defendant in effecting the purchase and getting possession. But in *Bradley v. Davis*, 14 Me. 44, it was decided that if the bailee delivered the goods to a stranger the owner could not maintain trespass.

CHATTELS BAILED OR LEASED FOR A SPECIFIC TERM.—The owner of goods who bails or leases them to another for a definite period, can not during such period maintain trespass for them, because he has parted not only with his possession but with his right of possession until the term expires: *Putnam v. Wyley*, 5 Am. Dec. 346; *Bell v. Monahan*, Dudley (S. C) 38; *McFarland v. Smith*, Walker (Miss.) 172; *Lacoste v. Pipkin*, 13 Sm. & Marsh. 589; *Clark v. Carlton*, 1 N. H. 110; *Corfield v. Coryell*, 4 Wash. C. C. 371; *Walcot v. Pomeroy*, 2 Pick. 121; *Muggridge v. Eveleth*, 9 Met. 233; *Lunt v. Brown*, 13 Me. 236; *Lewis v. Carsaw*, 15 Pa. St. 31; *Ward v. McCauley*, 4 T. R. 489. Hence, if the bailee of the goods has a lien upon them or a special property in them, by virtue of which he has a right to retain possession of them against the owner, the latter, having no right of possession, can not maintain trespass for them: *Wilson v. Martin*, 40 N. H. 88. See the opinion of Fowler, J., in this case quoted *supra*. The contrary doctrine seems to be erroneously laid down in Bac. Abr., Trespass, C. 2. If a sheriff, after levying on goods, deliver them to receptors, upon their agreement to redeliver them at a specified time, he can not before that time maintain trespass against one who takes them: *Lewis v. Carsaw*, 15 Pa. St. 31. And where the owner of goods let or bailed for a definite period has reserved the right to demand them before that time, he can not, until the period has expired, bring trespass for them without showing such demand: *Hume v. Tufts*, 6 Blackf. 136; *Soper v. Sumner*, 5 Vt. 274. A lessor of a farm for one half the crop, to be separated and delivered on the farm, has not, until such separation and delivery, such property in any part of the crop as to be able to bring trespass against one taking or injuring the same: *Hurd v. Darling*, 16 Vt. 377. Where, however,

it is provided in a lease that the crop shall be the lessor's property until the rent is paid, he may maintain trespass against one seizing them on execution or attachment against the lessee: *Smith v. Atkins*, 18 Vt. 461. So, where one let a farm and certain sheep for a year at a certain rent, but provided in the lease that the wool growing on the sheep and the lambs they might have should remain his property "until the worth of it and them" was paid towards the use of the place, it was held that he might trespass against one taking such wool or lambs: *Whitcomb v. Tower*, 12 Met. 487. After the time for which a chattel has been let or bailed has expired, the limitation upon the owner's immediate right of possession is removed, and he may sue for any trespass then committed: *Keyes v. Howe*, 18 Vt. 411.

In case of a conditional sale of chattels to be paid for at a specified time, where the vendee is to have possession until the time for payment has expired although the vendor is to retain the right of property, he can not maintain trespass for an injury thereto before the time has elapsed: *Hurd v. Fleming*, 34 Vt. 169. But the conditional vendee, or a purchaser from him, may, after full payment or tender thereof according to the contract, bring trespass even against the vendor for taking the property: *Bailey v. Colby*, 34 N. H. 29. In *Richards v. Symons*, 8 Q. B. (Ad. & El. N. S.) 90; S. C., 10 Jur. 6; 15 L. J. Q. B. 35, where one had a lien on a cow for pasturage, the owner retaining the privilege of milking her, and it being understood that if the owner should drive her away the bailee might retake her wherever he found her, it was held that upon the owner's taking away the cow the lien was not destroyed, but the bailee could resume possession according to the contract, and the owner could not bring trespass against him for so doing. In *Dunning v. Fitch*, 66 Ill. 51, it was decided that one having a mere landlord's lien on goods of his tenant, but not being in possession, could not bring trespass against a collector of taxes seizing them as the tenant's property.

RIGHT OF MORTGAGEE OF CHATTELS.—A mortgagee of chattels has an immediate right to possession unless there is a stipulation in the contract to the contrary, and may, therefore, bring trespass against one who wrongfully takes or injures them: *Codman v. Freeman*, 3 Cush. 306; *Woodruff v. Halsey*, 8 Pick. 333; *Doise v. Knorr*, 10 Met. 40; *Brackett v. Bullard*, 12 Id. 308; *Bird v. Clark*, 3 Day, 272; *Welch v. Whittemore*, 25 Me. 86; *Libby v. Cushman*, 29 Id. 429. Especially after condition broken: *Swigert v. Thomas*, 7 Dana, 220. In *Foster v. Perkins*, 42 Me. 168, it was held that the mortgagee might maintain the action against a wrong-doer even where the contract provided that the mortgagor should retain possession for the purpose of selling the property and paying off the mortgage, such possession being merely that of an agent. But a mortgagee can not maintain trespass by virtue of his constructive possession, if the mortgagor had no title, for constructive possession is founded on title: *Howe v. Farrar*, 44 Me. 233. It has been held that a mortgage of after-acquired goods did not give the mortgagee a right to maintain trespass with respect to such goods, as where the mortgage stated that it was to "include, not only the articles then in the store, but whatever may be at any time therein:" *Hamilton v. Rogers*, 8 Md. 301, approving the doctrine laid down in *Lunn v. Thornton*, 1 M. G. & S. 379, disapproving *dicta* in *Tapfield v. Hillman*, 6 M. & G. 245, questioning *Hannon v. State*, 9 Gill. 440, and distinguishing *Fletcher v. Morey*, 2 Story, 555, and *Mitchell v. Winslow*, Id. 630. But in the case of things potentially in existence, as the future products of a dairy farm, the mortgagee can maintain trespass: *Van Hoozer v. Cory*, 34 Barb. 9; *Conderman v. Smith*, 41 Id. 404.

RIGHT OF PURCHASER BEFORE DELIVERY.—"If the owner of goods, which

are at York, give them to J. S., who, at the time of the gift, is in London, and before J. S. have obtained the actual possession of the goods, a stranger take them, J. S. may maintain an action of trespass against the stranger, for by the gift he obtained a general property in the goods." Bac. Abr., Trespass, C. 2. A purchaser of goods undoubtedly has such constructive possession before delivery, as to maintain trespass against a stranger: *Thomas v. Philips*, 7 Car. & P. 573; *Parsons v. Dickinson*, 11 Pick. 352; *Crenshaw v. Moore*, 10 Ga. 384. But where the property is not paid for, and it is provided in the contract that the purchaser is not to have possession until he has made payment, it is otherwise: *Creps v. Dunham*, 69 Pa. St. 456. But as against creditors of the vendor, there must be an actual and continued change of possession, or the sale will be deemed fraudulent and the purchaser can not maintain trespass: *Stephenson v. Clark*, 20 Vt. 624; *Mills v. Warner*, 19 Id. 609; *Houston v. Howard*, 39 Id. 51; *Sleeper v. Pollard*, 28 Id. 709; *Graham v. McCreary*, 40 Pa. St. 515. The Vermont rule on this point is particularly stringent. Where one being an owner of a moiety of goods in possession of a cotenant, purchases the remaining moiety, no new delivery is necessary, for he is already in possession by construction of law: *Kittredge v. Sumner*, 11 Pick. 50. Where the goods are in the possession of a custodian for the vendor at the time of the sale, the purchaser does not acquire such possession as to be able to maintain trespass against creditors of the vendor until the custodian has been notified of the sale, and has been constituted keeper of the property for such purchaser: *Barney v. Brown*, 2 Vt. 374; *Spaulding v. Austin*, Id. 555; *Potter v. Washburn*, 13 Id. 558; *Whitney v. Lynde*, 16 Id. 579; *Willard v. Luel*, 17 Id. 412; *Morse v. Pike*, 15 N. H. 529; *Abbott v. McCartney*, 1 Holmes, 80. Notification by the vendor, but not by the purchaser, it seems, is not enough: *Judd v. Langdon*, 5 Vt. 231. If, however, the custodian has been notified of the sale by both parties, his consent to hold for the purchaser is not necessary: *Pierce v. Chipman*, 8 Vt. 334. In *Abbott v. McCartney*, 1 Holmes, 80, the plaintiff purchased a wagon on an attachment sale, under the Massachusetts statute, credit being given until the termination of the suit, but the custodian was notified by the officer and auctioneer not to give up the wagon, except on production of a receipt for the purchase-money. The defendant, a collector of the United States revenue, seized and sold the wagon for unpaid taxes due from the original owner, and it was held that the plaintiff had such title as to maintain trespass. The fact that the vendor is employed by the purchaser to manage the property or perform labor upon it does not, it seems, necessarily render the transaction fraudulent so as to preclude the purchaser from maintaining trespass against an attaching creditor of the vendor: *Koster v. Merritt*, 32 Conn. 246; *Fiske v. Small*, 25 Me. 453; *Mason v. Gale*, 6 Vt. 600. In *Beals v. Guernsey*, 5 Am. Dec. 343, it was held that one who purchased goods from a bankrupt who was in prison upon the gaol limits could maintain trespass against an officer seizing the property on a subsequent execution upon a judgment of which the purchaser had knowledge at the time, unless he made the purchase for the purpose of defeating the execution. A purchaser of after-acquired property can not, in general, maintain trespass for the taking or injury thereof, after it is acquired: *Wilson v. Wilson*, 37 Md. 1. But an assignee of a permit to cut timber, upon another's land, may bring trespass against an officer seizing trees afterwards cut under an attachment against the assignor: *Sawyer v. Wilson*, 61 Me. 529. One who has contracted for the manufacture of an article has not, until delivery and acceptance, such title as to maintain trespass: *Ledbetter v. Blasen-game*, 31 Ala. 495. The title is in the manufacturer, and he may have tres-

pass against an officer attaching it as the purchaser's property: *Phelps v. Willard*, 16 Pick. 29.

OWNER WRONGFULLY DIVESTED OF POSSESSION.—Says Siderfin, in his note to *Wilbraham v. Snow*, Sid. 438: "If A. takes my goods, and then B. takes them from A., I can have trespass or trover against one or the other at my election, though the decision in *Croke* is that I have not trespass against B." So it is held in *Cox v. Hall*, 18 Vt. 191, that where an officer wrongfully attaches property, and while in his custody it is wrongfully attached by another creditor, the owner may have trespass for such subsequent attachment. But a contrary doctrine is maintained in *Hunt v. Pratt*, 7 R. I. 283. So it is decided in *Ginsberg v. Pohl*, 35 Md. 505, that where goods are attached as the property of a third person they are in *custodia legis*, and the owner can not have trespass against one subsequently attaching them. Where the owner of goods is induced to part with them by fraud and deceit, he has nevertheless such constructive possession as to maintain trespass: *Asa v. Putnam*, 1 Hill, 302; *Root v. French*, 13 Wend. 570; *Bulter v. Collins*, 12 Cal. 457. Where there is a mistake between the vendor and purchaser as to what property is included in the sale, and the purchaser takes possession of property which the vendor did not intend to sell, the latter may have trespass for such taking: *Hobart v. Hagget*, 1 Greenl. 67; 8 C., Ames Sel. Cas. on Torts, 87.

DOUBLE RIGHT OF ACTION FOR SAME TRESPASS.—"We understand the law to be well settled that in cases of bailment, unless the bailee has the absolute right to retain possession of the property for a definite time, the action of trespass against a wrong-doer may be brought either in the name of the bailor or the bailee:" Redfield, C. J., in *Strong v. Adams*, 30 Vt. 222. The same doctrine is approved and applied in *Bradley v. Davis*, 14 Me. 44; and *Browning v. Skillman*, 24 N. J. L. (4 Zab.) 351. In *Neff v. Thompson*, 8 Barb. 213, it was held that the same rule applied where sheep were taken from the possession of one who had a lien upon them for keeping them. It is intimated, however, in *McFarland v. Smith*, Walker (Miss.) 172, that two individuals can not have trespass against the same person for the same tort. A recovery by either the owner or the bailee "ousts the other of his action:" 2 Roll. Abr. 569; *Neff v. Thompson*, 8 Barb. 213. In *Bradley v. Davis*, 14 Me. 44, it is said that the right "attaches in him who first brings the action."

POSSESSION TO MAINTAIN TROVER.—See on this subject the note to *Hostler v. Skull*, 1 Am. Dec. 585.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

BRILEY v. CHERRY.

[2 DEVEREUX'S LAW, 2.]

PURCHASER AT SHERIFF'S SALE AND THE DEFENDANT IN EXECUTION are not privies in estate, for the former succeeds also to the rights of the plaintiff; and privies in estate are those only who come in under their vendor.

IN AN ACTION OF DETINUE FOR A SLAVE, the record of a recovery had by the same plaintiffs in a former action of detinue for the same slave is not evidence against the title of the defendant in the second action, who had pending the former action purchased such slave at an execution sale.

DETINUE for a slave. On the trial, the defendant set up title in one Jackson, against whom he produced a judgment, with an execution thereon, and a bill of sale made by the constable to whom the execution was directed. The plaintiff then produced the record of a recovery had by him as executor in an action of detinue, for the same slave against Jackson; and proved that the sale to the defendant was made pending that suit.

The judge instructed the jury that the record produced by the plaintiff was not evidence against the title of the defendant, as the latter was neither party nor privy to that record; and that neither the fact that the action against Jackson was pending at the time of the defendant's, nor the subsequent judgment therein made the defendant such a privy under Jackson as estopped him from showing that plaintiff's testator had no title to the slave; but that the defendant might show that Jackson had title at the time of the purchase made by him.

Gaston, for the plaintiff, contended that if a *scire facias* had
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been brought upon the judgment in detinue recovered by the plaintiff against Jackson, the defendant would be estopped to deny his title: 3 Black. Com. 412, 413. And that wherever a judgment is conclusive as to the property in one form of action, it is so in all others: *Hoyt v. Gelson*, 13 Johns. 564; *Bez v. Mayor of York*, 5 T. R. 72; *Cooke v. Sholl*, Id. 255.

Devereaux, for the defendant, admitted that if the plaintiff had sued out a *scire facias*, the defendant, coming in *pendente lite*, could not resist that process; but he contended that an action of detinue by the present defendant, after a judgment on the *scire facias*, would not be barred by that judgment. He also contended that a judgment in detinue was no evidence of title: 1 Starkie's Ev. 258; *Murrell v. Johnson*, 1 Hen. & Mun. 450; *Wethers v. Wethers*, 6 Mum. 10.

HENDERSON, J. A verdict and judgment in an action of detinue are conclusive as to the title between the parties and their privies; and I think that the action of detinue is an affirmation of a continuing title to the thing detained, and that the plaintiff does not, as he does in an action of trover, disaffirm a continuance of title in himself, but may sustain an action for the same chattel against a third person, or even against the same party, although he may have obtained a judgment for it before, provided that judgment has not been satisfied; and I am at a loss to understand the case of *Wethers v. Wethers*, cited at the bar, where the executor of a former plaintiff brought an action of detinue against the executor of a former defendant, in which the plaintiff had recovered the same slave, and offered that verdict and judgment as evidence of title, which was rejected; because, as is said by the court, it was not declared on. I think that it was evidence of title as much as a bill of sale; and a plaintiff in such case, and, in fact, in every other, declares not upon the evidence, but upon the fact. Privies in estate are those who come in under the owner, and the estate stands burdened in their hands with those incumbrances created by him, before he parted with it, therefore, if a suit was pending against him for the property when he parted with it, in which there afterwards was a judgment, that judgment relates to the commencement of the suit, and binds subsequent purchasers.

But one who comes in under a sheriff's sale at execution, can not be called a privy, for he is not only clothed with the title of the defendant in the execution, but also with the rights of the creditor, which may be paramount to those of the debtor *quoad*

the thing sold. It is to his rights also that such purchasers succeed, and, therefore, he is not privy in estate to the former owner. The verdict and judgment in this case, therefore, are not evidence against the defendant.

HALL, J. I do not consider that the defendant is a privy under Jackson. He claims under a sale made by a constable. When the title was acquired by him under the execution, there was no judgment against Jackson, and his purchase did not make the defendant a party to the suit depending against Jackson; he ought not, therefore, to be bound by its determination. It may be that the rights of creditors to the negro in question are superior to that of the plaintiffs, although the plaintiffs' title be better than that of Jackson.

Suppose the plaintiffs had a bill of sale from Jackson, but upon a consideration quite inadequate; they might recover against him; but a *bona fide* creditor of his may have an execution levied upon the property conveyed by the bill of sale, and thereby establish a right to it, which would be superior to that of the vendor or vendee, when at the same time a subsequent vendee of Jackson had no better claim than Jackson himself. Suppose, again, that after the plaintiffs had sued Jackson in detinue, the present defendant had also brought an action of detinue for the same property, and had recovered a judgment, and taken possession under it of the property sued for, and then the plaintiffs had obtained a judgment against Jackson for the same property, would it be thought for a moment, that in a third suit by the plaintiffs against the defendant, the plaintiffs' judgment against Jackson would be conclusive evidence against the defendant? It certainly would be considered as a proceeding to which the defendant was not a party, and by which, of course, he ought not to be bound. In the present case, the defendant does not claim under a judgment in an action of detinue, but he claims under a judgment rendered against Jackson in *invitum*, and an execution which issued upon it.

I think that the charge of the judge below was right, and that the rule for a new trial should be discharged.

By COURT. Let the judgment below be affirmed.

In *Vines v. Brownrigg*, 1 Dev. & Bat. Law, 239, the court quotes with approval the following language of the court in this case: "That an action of detinue is an affirmation of a continuing title to the thing detained, and that the plaintiff does not, as he does in an action of trover, disaffirm a continuance

of title in himself, but may sustain an action for the same chattels against a third person, or even against the same party, although he may have obtained a judgment for it before, provided that judgment has not been satisfied." And in *Cates v. Whitfield*, 8 Jones' Law, 266, it is cited to the point that a verdict and judgment in an action of detinue are conclusive between the parties and their privies.

SMITH v. GREENLEE.

[3 DEVEREUX'S LAW, 126.]

SHERIFF'S SALE AT AUCTION, UNDER EXECUTION, where puffers are employed, or a combination of bidders is formed for the purpose of stifling competition, is void at law, and a deed executed in pursuance of it conveys no title; but an association of bidders fairly formed, because of the magnitude of the purchase, or for other proper cause, does not vitiate such sale.

EJECTMENT for a tract of land in Buncombe county. On the trial the lessors of the plaintiff, W. R. Smith, J. M. Smith, and Philip Brittain, produced a judgment and an execution thereon, against one James Greenlee, and a sheriff's deed to them for the land in dispute, as the highest bidders at the execution sale. They also produced a deed from James Greenlee to the defendant, which they impeached as fraudulent.

Defendant attacked the sheriff's sale as fraudulent and set up his possession alone against the defective title of the plaintiffs. He proved that the land was estimated to be worth from five thousand dollars to ten thousand dollars; that at the sale one of the lessors of the plaintiff bid two hundred dollars; that another of them bid on him, as did also a third person; that thereupon the lessors of the plaintiff went apart by themselves and agreed not to bid against one another, and that the purchase should be for the joint benefit of the three; that the sheriff was informed of this arrangement and told to consider the bid of any one of the three as the bid of all. Under this arrangement only one of them bid, and the land was struck off to them at four hundred dollars.

The judge instructed the jury that if the lessors of the plaintiff had formed a combination not to bid against one another, but that one should bid for the benefit of all, and that the two, who were admitted to be partners, desisted from bidding, and that all this was known to the sheriff and sanctioned by him, the combination was against public policy, and the sale was void. There was a verdict for the defendant, and the plaintiff appealed.

Swain, for the plaintiffs.

Gaston and Badger, for the defendants.

HENDERSON, C. J. A sale at auction is a sale to the best bidder; its object a fair price, its means competition. Any agreement, therefore, to stifle competition is a fraud upon the principles on which the sale is founded. It not only vitiates the contract between the parties, so that they can claim nothing from each other, but also any purchase made under it, their claims against the vendor being weaker than those against each other, policy alone forbidding that the last mentioned should be enforced, but both policy and justice uniting to condemn the former. If this be the rule with regard to auctions instituted by private individuals, *a fortiori* should it be as to those public auctions instituted by law for great public purposes; such as execution sales, where the object is to secure the creditor, if possible, the satisfaction of his debt, and at the same time to obtain for the debtor a fair price for his property. Men may, from the very worst of motives, both towards the creditor and debtor, abstain from bidding without incurring any legal censure. They have a right to abstain from action—they may act or not, at their pleasure, but if they do act, they must do it fairly. They can not claim to themselves any benefit from a sale, the first principles of which they have violated, fair competition being the very essence of an auction sale. Puffing or by-bidding is a fraud on the vendee.

So, on the other hand, an agreement not to bid, for the purpose of paralyzing competition, is a fraud upon the vendor, and vitiates the sale at least so far that no party to such agreement can claim any benefit from it. I presume it is good as to those who did not participate in the agreement. I think, also, that the fraud is of such a character that it vitiates the sale at law. There is no part of the transaction which should be preserved, and which, therefore, may render it more proper for the interposition of a court of equity; the transaction being totally void, so much so that even the purchase money paid can not be recovered back. But it should be clearly understood, that it is not intended to intimate an opinion, that persons may not associate together, and unite in their biddings from any other cause or motive, than that of destroying, stifling, or paralyzing competition. Persons may unquestionably unite in their biddings, under a great variety of circumstances. As where the whole article, for any reason, does not suit the individuals of the associa-

tion, as being of more cost than one would wish to purchase, or where it consists of parts, some suitable to one and some to others of the association, or where the purchase might involve a risk which they, as individuals, are not willing to encounter; as a disputed title or the like, or the case of a loss upon a re-sale where the profits may be very great, and so may the loss; or if the association acts from motives of humanity and benevolence to some individual whom they intend to benefit, and by a joint bid equalize the burden. But it is much easier to point out cases where the rule operates than where it does not. It is confined, I think, to the cases before mentioned, where the agreement is designed to affect, and does affect fair competition, paralyzing the bidding.

I have but little doubt, from the charge of the judge, that he entertained the same notions of the law of the case as this court does, and his charge, as far as it goes, is correct. But I am not quite certain that the jury may not have understood that the sale was vitiated by an association for an object, deemed both by the judge below and by this court perfectly justifiable. In other words, I fear that the charge was not sufficiently explicit, for it is by implication only that I can make it embrace the principles declared in this opinion. I am not satisfied that the case was left to the jury under the influence of these principles. I think, therefore, that there should be a new trial, and I more readily assent to it, because very little injury can result, as the defendant remains in possession.

The case should be left to the jury under the influence of the principles above expressed, with a caution to them to disregard the mere assertion of the parties, that they united because of the disputed title; but to ascertain the real motives if they can, and if it was to destroy or impair competition, to find for the defendant.

By COURT. Let the judgment be reversed and a new trial granted.

Cited to the point that a public sale, where puffers are employed, or a combination is formed for the purpose of paralyzing competition, is void, in the following cases: *Goode v. Hawkins*, 2 Dev. Eq. 393; *Bailey v. Morgan*, Bush. Law, 352; *Whitaker v. Bond*, 63 N. C. 290.

It was held in *Dudley v. Little*, 15 Am. Dec. 575, that where a partnership or combination was formed at a tax sale for the express purpose of making purchases thereat, the purchaser could not obtain an available title.

DOWD v. WADSWORTH.

[2 DEVEREUX'S LAW, 130.]

SUIT BROUGHT IN NAME OF GUARDIAN, although he describes himself as guardian, is his suit, not that of his ward; and, in such suit, evidence of the ward's title is irrelevant.

POSSESSION, COUPLED WITH CLAIM OF TITLE AND ACTS OF OWNERSHIP, is evidence of a conversion.

ONE WHO IS IN POSSESSION OF ANOTHER'S PROPERTY is bound to surrender it upon demand; but if he does not know the owner, claims no property in himself, and is willing to give it up, upon being exonerated, he is not guilty of a conversion.

TROVER for a horse, brought by the plaintiff in his own name, as the guardian of Daniel Blue. The cause was tried on a plea of not guilty. The plaintiff proved a gift of the horse to his ward by his grandfather, the late husband of the defendant; that the testator had bequeathed all his personal property to the defendant during her life; that the horse was on testator's plantation, where the defendant continued to reside; that she had used the horse after the death of her husband, and denied that it had ever been given to the plaintiff's ward. Plaintiff, on behalf of his ward, demanded the horse of the defendant, but she answered that he was not in her possession, but in that of the agent of the executor, who lived some miles distant; that she would do nothing until she saw the executor, and that she did not know that she would give it up at any rate. There was no proof of plaintiff's appointment as guardian.

The judge instructed the jury that, as to the fact of a conversion by the defendant, it was not necessary to prove a demand by the plaintiff, and a refusal by the defendant, if the horse was in her possession, and she had, since her husband's death, exercised acts of ownership over it inconsistent with plaintiff's title. There was a verdict for the plaintiff, and the defendant appealed.

Ruffin, for the defendant, objected: 1. That the writ was to answer Dowd, guardian of Blue, which made Dowd the plaintiff, while the property was shown to be in Blue, his ward; 2. That there was no conversion by the defendant, she being in possession by leave of the executor, and there being no proof that the plaintiff had been regularly appointed guardian; that to prove a conversion in such a case, demand must have been made by one who had authority to make it; that defendant had not asserted property in herself, but merely her inability and want of authority to deliver up the horse; that she had used it by per-

mission of the executor, and that she had not exercised any acts of ownership inconsistent with the rights of Blue.

No counsel appeared for the plaintiff.

HENDERSON, C. J. I am somewhat at a loss to say what this court, as a revising court, should do as to the error in bringing the suit. No doubt it was intended to be the infant's suit—it was so considered throughout. The trial was upon the infant's title. Yet it is the suit of the guardian; it is brought by him in his own name; for although he describes himself as guardian of the infant, that is but matter of description, and does not make it the suit of the infant. The court below, I think, should have rejected the whole of the evidence as irrelevant, for it did not tend to establish the title in the plaintiff but in his ward. I do not know what else we can do but to grant a new trial. The superior court may, under our act for the amendment of the law, and particularly under our construction of that act, permit an amendment upon terms, if it should be thought proper. The counsel for the defendant made a very ingenious argument to show that there was no conversion; but he has not satisfied me that there was none. It is evident the defendant claimed a life-estate in the horse, under the will of her husband, to which she was entitled if there was no valid gift to the infant.

The executor left the horse with the other property on the plantation, where the widow continued to reside, and she no doubt exercised acts of control and ownership over it; for it appears that she lent him to one of the witnesses to go to Fayetteville, and once to another person to go a short journey. That when demanded, she said the horse was not there; that he was in the possession of the agent of the executor, who lived three or four miles off. She said she would do nothing until she could see the executor, and that she did not know that she would give up the horse at any rate. This is very unlike the conduct of the possessor of a chattel, who, not knowing the owner, claims no property in it, but is willing to give it up, so that he is exonerated. On the contrary, it is very much like a claim, especially when coupled with her acts of ownership, and her concluding remark, that she did not know that she should give him up at any rate, which seems like disclaiming the authority of the executor. All this looks much like a claim for herself, and when coupled with her interest under the will, shows that she held adversely. The general rule is, that any person who is in the possession of another's property is bound

to surrender it upon demand. The exceptions are, where a person really and *bona fide* does not know that the applicant is the owner. By which I do not mean that he can not judge whether his title is good or bad, as it were, upon the law or intricate facts of the case; as if a man finds property, before the finder can be put in the wrong, there must be some grounds to believe that the applicant is the owner; not full proof, but something that would satisfy a reasonable man. Or, if one neighbor bails property to another, if it is demanded of the bailee, and he, thinking it is the bailor's, requests a delay until he can see the bailor and return it to him, this will not be evidence of a conversion. All these exceptions are founded in good sense, and it must appear on the transaction that the bailee neither claims possession for himself, nor even for his bailor, but only that he wished a delay to enable him to return it to the bailor, that the latter might exercise his free will, and not condemn the bailee for not doing so, and that the bailee might thus avoid a lawsuit. If this defendant held for the executor, it appears her motives were different from these. I rather suppose she considered that he held title for her, and that she held possession for herself; that she was mistress, and could direct an act as she pleased; for it seems that when matters came to an extremity, she would follow her own, and not his will. When one is in possession under a bailment, by holding for the bailor, and refusing to deliver the thing bailed upon demand, he identifies his possession with the title of the bailor; and if that is bad, the possession is a conversion, and he becomes personally chargeable. I think, therefore, the judge was right in the instructions given, and in the manner in which he left the case to the jury. As to the demand made by a person who does not show that he was guardian, or authorized to make it, I perfectly concur with the counsel, that the defendant might well refuse to deliver up the horse on such a demand; but this should have been done on that ground, and not on the claim of right, on her part; it is the claim of right which gives to her possession an adverse character. I think the defendant has no pretense to shelter herself under the bailment from the executor, for she identified herself with him, and if his title is bad, her possession is wrongful. But the judgment must be reversed, and a new trial granted for the cause first mentioned.

By COURT. Let the judgment below be reversed, and a new trial granted.

Cited to the point that possession and acts of ownership are repugnant to an admission of title in another, in *Powell v. Powell*, 1 Dev. & Bat. Eq. 379; and in *Savage v. Carter*, 64 N. C. 196, to the point that the legal payee of a bond is the only proper plaintiff.

As to what constitutes a conversion, see *Hale v. Ames*, 15 Am. Dec. 150, and note thereto, 151.

REID v. REID.

[2 DEVEREUX'S LAW, 247.]

RECEIPT IN FULL OF ALL DEMANDS IS PRIMA FACIE EVIDENCE of a settlement between the parties, and of the payment of the balance; and it is not merely evidence of the sum specified in it.

ASSUMPSIT for money had and received by the defendant to the use of the plaintiff. The pleas were non-assumpsit and payment. On the latter plea the defendant read in evidence the following receipt: "Received, July 20, 1826, of Thomas M. D. Reid, seven dollars, in full of all notes and accounts, or any claim or demand that ever existed between us up to the date above written."

The judge instructed the jury that the receipt might be and was evidence of payment, but although expressed to be in full, was only good for the amount actually paid on it, and if plaintiff was entitled to more than that amount, he had a right to recover it. There was a verdict for the plaintiff, and the defendant appealed.

Seawell, for the defendant, submitted the case without argument.

No counsel for the plaintiff.

RUFFIN, J. Several points were made in this case in the court below. But as it seems to turn chiefly upon the effect of a receipt, given in evidence by the defendant, and the opinion of the court on that point is decisive of the cause, the others will not be noticed.

The plaintiff claims a share of the price of a slave belonging to him and others, which the defendant, as their agent, sold. On the trial the defendant gave in evidence a receipt from the plaintiff dated after the sale, and receipt of the price, for seven dollars, in full of all notes and accounts, or any claim or demand that ever existed between them up to that date. The defendant's counsel contended that the receipt was conclusive evidence of the payment of the money sued for in this action.

But the judge very properly held the contrary. It certainly is not conclusive in the sense of admitting no proof to the contrary. The court, however, proceeded to instruct the jury that although the paper was evidence of payment, it proved the payment of seven dollars, the sum expressed in it, and that sum only. So I am obliged to understand the judge's words. They are "the receipt being only for that sum, it is only evidence of payment to that amount." I think the receipt *prima facie* evidence that an account was stated between the parties, and the balance of seven dollars then paid. It certainly is not conclusive that full payment was made. It is not conclusive of anything: *Straton v. Rastall*, 2 T. R. 366; not even that the seven dollars were paid. Why this instrument, more than other writings, should be subject to correction by proof *aliunde*, it is too late to inquire. The rule is well established. For instance, the effect of this receipt would be repelled as conclusive proof of the payment of seven dollars, by showing that the payment was in counterfeit bank notes, or in a promissory note which turned out to be bad. In either case the plaintiff might recur to his original debt, unless it was expressly agreed that it should be extinguished by the receipt of the notes: *Hargrave v. Dusenberry*, 2 Hawks, 326;¹ *McKinsley v. Pearsall*, 3 Johns. 319;² *Tobey v. Barber*, 5 Id. 68 [4 Am. Dec. 326]. The receipt is open to proof that there was a mistake in stating the account, or in striking the balance; a mistake in telling the money; a mistake in the nature or value of the thing paid; and the like. All that these cases prove is, that when the errors are made to appear the receipt shall not still stand as a bar. In one case, indeed, this court has gone the length of saying that such a mistake in a receipt under hand and seal, if there was a subsequent express promise to pay the money, might be corrected; that notwithstanding the receipt, the mistake was a sufficient consideration for the promise: *Smith v. Amis*, 3 Hawks, 469. The receipt, however, remains evidence of the facts stated in it until those facts be clearly disproved, and a mistake shown. I see no reason to limit this operation of it, so as to make it evidence of one of those facts more than of another. It is presumptive *prima facie* proof of the whole. There must be particular circumstances to prevent its so being. Why in this case is it held by the judge to be evidence of the payment of seven dollars? Clearly because the parties say so in it. Do they not

1. *Hargrave v. Dusenbury*, 2 Hawks, 326.

2. *McKinsley v. Pearsall*, 3 Johns. 319.

likewise say that it was in full; that seven dollars was all the defendant then owed the plaintiff? Shall this declaration go for nothing? If so, why? I admit that the payment of a less sum is not a satisfaction of a larger then due, even if it be received as such. But it appears to me that a receipt for a particular sum, expressed to be in full, is, in good sense, evidence that the debt itself was no more than the specific sum. If it proved to be more, then the receipt is evidence that there had been prior payments; that the parties have accounted, and that the specific sum is the balance due.

This is, however, all open to proof that they had not accounted, or that they accounted touching particular dealings, which did not include the matter now in dispute. It is impossible to enumerate all possible cases wherein the force of the receipt might be impaired or destroyed. They do not, however, affect this case, which depends upon the effect of the receipt unexplained. *Per se* it proves that the defendant owed the plaintiff nothing. In *Henderson v. Moore*, 5 Cranch, 11, it was held that the parol acknowledgment of the plaintiff that a small sum paid him was in full of a larger sum due on the bond sued on, was evidence, on the plea of payment, that the whole was paid; and that on it the jury might and ought to presume full payment, unless such presumption should be repelled by other evidence. For a part of the money might have been paid before, and the acknowledgment is good evidence to show, not that more than a particular sum was then paid, but that the whole was satisfied by payments then and before made. And this has been carried so far as to make the payment of one debt evidence of the payment of another, and, under certain circumstances, conclusive evidence. Chief Baron Gilbert says: If one give a receipt for the last rent, the former is presumed to be paid, especially if the receipt be in full of all demands, then it is plain there were no debts standing out. If this be under hand and seal, the presumption is so strong that the law admits no proof to the contrary. No doubt this last is because it is constructively a release: Gilb. Law of Ev. 42.

Cases are found in which the receipt in full, as by the judge below, has been allowed only as proof of the specific payment, and not of a general discharge. But they turn on peculiar grounds and particular circumstances. There is an instance in *Middleditch v. Sharland*, 5 Ves. 87. But plainly the master of the rolls refused to consider it an absolute bar, by reason of the situation of the parties, their relation to each other, and the

suspicious circumstances apparent on the answer. It was a bill filed by a devisee against a steward, who relied on a receipt in full from the testatrix. The bill charged the weakness of the testatrix; that the receipt was obtained by imposition upon her, and without any accounts kept, stated, or settled. The defendant denied the fraud, it is true. But he could not deny her imbecility, nor that there was no account stated, and he exhibited no account with his answer. This was of itself a fraud, and the cause was decided on that ground. He was bound to keep an account, and with such a principal to show that it was fairly settled. Therefore, a general account was there ordered in which the receipt was to be evidence of the particular sum mentioned in it, and nothing could be juster. But there is no such case before us; and, therefore, the general rule must prevail.

By COURT. Let the judgment below be reversed, and a new trial awarded.

DAWSON v. DAWSON.

[1 DEVEREUX'S EQUITY, 38.]

DEFECTIVE VOLUNTARY CONVEYANCES will not be aided or perfected in equity, and want of consideration is a good defense to a bill for rectifying such conveyances.

WHERE RIGHTS ARE VESTED BY EXECUTED VOLUNTARY CONVEYANCE, a court of equity will recognize and protect such rights.

BILL in equity. The bill stated that Harry Dawson, the husband of defendant, Sally Dawson, bequeathed his negroes to her and to her sister, defendant Evelina Alston, as tenants in common, a moiety to each. That letters of administration, with the will annexed, were issued to defendant, George Alston, a brother of the legatees; that defendant, Sally, had, in consideration of love and affection, conveyed to plaintiffs, John and Jesse Dawson, the brothers of her deceased husband, all the negroes that had belonged to her husband before her marriage, that might fall to her upon a division of them between her sister and herself, reserving to herself a life-estate in said negroes, and providing that the donees should pay to the other plaintiff, Martha Dawson, one third of their value. The bill then charged that defendant, George Alston, had a division of the negroes made between the legatees, under an order of the county court. That plaintiffs, at the time of the making of the division, informed the commissioners of the interest which they held under

said deed from defendant, Sally, and requested them to divide the negroes in a fair and equitable manner. But that defendant, George, with intent to render said conveyance ineffectual, fraudulently procured an allotment of all the negroes that had belonged to defendant, Sally, before her marriage, to be made to her, and all those that had belonged to the testator, before that time, to be allotted to defendant, Erelina. The bill prayed that this division might be set aside, and a new one made on just and equitable principles. The defendants demurred to the bill, and the demurrer was sustained, and the bill dismissed. The plaintiffs appealed.

Gaston, for the plaintiffs, contended: 1. That the property conveyed by the deed was incident to property vested in Mrs. Dawson, and was, therefore, the subject of an executed contract: *Fonville v. Casey*, 1 Murph. 389 [4 Am. Dec. 559]; 2. That if the contract could not be deemed executed, its subject-matter not being in *esse*, yet it was an executory agreement, and binding upon the covenantee; 3. That as the contract related solely to chattels, and was under seal, it required no consideration for its support, and would be protected from fraudulent combinations: *Bunn v. Winthrop*, 1 Johns. Ch. 329, 336; 4. That the contrivance resorted to was a fraud upon the rights of the plaintiffs.

Badger, for the defendants. No agreement will be enforced in this court without a valuable or a meritorious consideration. The latter includes only the case of a father providing for his child, or a husband for his wife, and the like, and never extends to collaterals: *Newland on Contracts*; *Ellison v. Ellison*, 6 Ves. 661; *Coleman v. Sarrel*, 1 Ves. jun. 50. Equity will do nothing in the case of a mere voluntary contract. It will not prevent a voluntary settler from selling so as to defeat the settlement: *Pulvertoft v. Pulvertoft*, 18 Ves. 84, 98; *Buckle v. Mitchell*, Id. 100, 112. Powers defectively executed, are aided in a court of equity only in favor of a wife, children, purchasers, or creditors, but never for volunteers: 4 Cruise Dig. Ch. 17. There is no case showing that the tenant for life is ever controlled: 4 Cruise Ch. S. 33. As the conveyance was a mere gift to the plaintiffs, they can not complain that they have received less than they expected: *Wallwyn v. Coultts*, 3 Merivale, 707.

Gaston, in reply, explained and commented upon *Coleman v. Sarrel*, 1 Ves. jun. 50; *Ellison v. Ellison*, 6 Ves. 661; *Wallwyn v. Coultts*, 3 Merivale, 707; and *Pulvertoft v. Pulvertoft*, 18 Ves.

84, and cited *Jones v. Martin*, 5 Ves. jun. 266, note; and *Cocklinton v. Bayne*, 1 Bro. Ch. 450.

HENDERSON, J. Voluntary executory agreements receive no aid either from courts of law or of equity. The parties stand upon their rights, such as they are, and hence it is a maxim that defective voluntary agreements will not be aided in a court of equity, any reformation of a conveyance being an execution of the original agreement so far as the conveyance is varied. The same motive which induces a court to refrain from enforcing an agreement, no part of which is executed, prevents it from enforcing any part of it. The want of a consideration is, therefore, universally a good defense to a bill for rectifying a voluntary conveyance, or enforcing a voluntary agreement. Where, however, the conveyance is complete, and property passes, or rights are vested by it, that property or those rights are guarded and protected, notwithstanding there was no consideration for passing or raising them.

The question presented by this demurrer, therefore, is: Does this bill seek for other rights than those created by the conveyance, or does it only seek for the security and protection of those which the deed has already given to the plaintiffs?

The deed transfers to the plaintiffs such of the slaves as had belonged to the husband of the donor, and which should be allotted to her upon a division between her sister and herself. This is a gift of slaves *in presenti* who were to be designated by an act *in futuro*. If, upon the division, none of the kind were allotted, nothing passed; if any such were allotted, they did pass. The right to call for this division did not arise from any promise made by the donor that she would divide, for then, it is admitted, that a consideration would be necessary to support it, but it arose as a necessary incident to the right of property created by the deed. If anything passed by the deed it diminished the property of the donor and destroyed the power of making such a division as she pleased, which, as owner, she possessed before its execution, and imposed upon her the obligation of regarding the interest of the donees. If this is not the case, and she is at liberty to divide as she pleases, the deed might be made by her perfectly ineffectual, as she could at once have assigned to her sister all the slaves which belonged to her husband, and thus entirely defeat the gift. A difference can not be perceived between such a division and the one complained of, for it is clearly illusory and defeats the rights of the donees, if not to the same extent, certainly it does in some degree, which, in principle, is

as objectionable as the total frustration of the gift. It has been likened to the case where a man grants all the corn which he may grow, or, to use the common phrase, make, in a particular field. Although he can not be enforced to cultivate that field, yet he shall not actively interfere for the purpose of defeating his gift or grant by wantonly destroying the corn growing there. But this, it is said, would be a wanton act, and one to which self-interest does not prompt, as it does in the present case. True, but it is as equally inadmissible to pursue our own interest at the expense of the rights of others as it is wantonly to destroy those rights. The principle is, that I may, by a rightful act, take care of myself, although I may thereby injure another. All laws, human or divine, allow this; but I can not do this by a wrongful act. But this, it is said, is begging the question, and it is insisted that the division complained of is not a wrongful act. That act, however, can not be rightful which entirely destroys and renders of no effect a gift or transfer passing property, which, if permitted to operate in the usual and ordinary way, would produce a probable benefit to the donee; and it is obvious that the probable effect of the deed would be beneficial, as it required a combination to prevent its ordinary result.

As soon as this gift was made, if the deed was not a perfect nullity, certain rights were created by it in the donees. It is true they were contingent, as to the particular subject upon which they would attach, but it would be strange to allow the right, and at the same time place it out of the protection of the law.

Such is my view of the case. I have considered the deed as if fairly obtained, and that there has been a fraudulent combination to obstruct its fair and usual operation. But I must observe, that I have had, and still have, difficulty upon it. I am disposed to overrule the demurrer, without prejudice and without costs.

HALL, J. When it is said the deed in question is voluntary, that it was given upon no consideration, it seems difficult to adduce reasons why the court should proceed in the case and grant relief. The old beaten ground, long since occupied by the courts of equity, not to aid voluntary conveyances, seems to render any reasons that might be urged to show that the bill should be dismissed, both trite and unnecessary.

But fraud, in making a division of the negroes, is alleged. The deed of gift was certainly given upon a contingency. There was something like a blank to a prize; something like an appeal

to the doctrine of chances. If the division of the negroes is set aside for fraud, and there is to be another drawing of the lottery, the managers or commissioners must be instructed, in the next division which they make, in order to protect the interest of the plaintiffs, or fraud will be again alleged. Indeed, to avoid fraud altogether, an equal division of the negroes ought to be made between Mrs. Dawson and her sister. For if we depart from the case, as the parties have made it by the deed, there is no stopping place between that and allowing the plaintiff a full share of the negroes in dispute. The parties themselves might have so inserted it in the deed, but we see they have not done so. And by this mode of proceeding the plaintiffs will be placed upon much more favorable ground than they stand on in the deed of gift made to them. They will, in fact, be made to draw a prize when they have not paid for a ticket.

I cannot hesitate to say, that the bill should be dismissed.

TAYLOR, C. J., concurring in opinion with Judge Henderson, it was ordered:

That the decree below be reversed, and the demurrer overruled, without prejudice and without costs.

Approved in *Love v. Belk*, 1 Ired. Eq. 163.

DONALDSON v. THE BANK OF CAPE FEAR.

[1 DEVEREUX'S EQUITY, 103.]

PROPERTY CONVEYED TO A PARTNERSHIP VESTS IN THE COMPANY, and not in the individual copartners; and the transfer of such property by one of the partners passes only a contingent right to a part after the debts are paid and the copartnership is ended.

CREDITOR WHO TAKES A MORTGAGE to secure an antecedent debt, without releasing a surety, is not a purchaser for value, without notice.

A MERE CREDITOR HAVING NO LIEN CAN NOT PURSUE HIS DEBTOR'S PROPERTY, which has been transferred to a third person. He must obtain a judgment before he can attack a transfer made by his debtor.

THE bill alleged that Robert Donaldson, John McMillan, and James Thorburn, while carrying on business as partners, under the firm name of Donaldson, McMillan & Co., acquired certain real estate, which was purchased with partnership funds. That the assurances for the land so acquired were sometimes made to the partnership, at other times to Donaldson and McMillan, as tenants in common, and in some instances either to

Donaldson or to McMillan, in severalty. That the copartnership was dissolved in 1808, by the death of Donaldson. That at the time of its dissolution it was insolvent, being largely indebted to one Samuel Donaldson, of London. That McMillan died in 1820, also insolvent and indebted to the company, and without a personal representative. That Samuel Donaldson died in 1813, and his executors had assigned to the plaintiff the debt due from the partnership to their testator. That defendant, Thorburn, the surviving partner, had admitted the debt to be due, and had, in part payment, assigned all the interest that vested in him as surviving partner to the plaintiff. That McMillan, before his death, had conveyed the lands acquired as above stated, to Strange and Winslow, in trust, to secure the payment of his individual debt due to the Bank of Cape Fear. That Winslow was dead, and Strange still held the lands. That McMillan was a trustee for the creditors of the company, and that the defendants had notice of the trust. The bill prayed that Strange might be declared a trustee for the plaintiff, and be compelled to convey to him all the estate which he held under the deed from McMillan. The heirs of Donaldson and those of McMillan, and the persons beneficially interested in the declaration of trust, made in the deed to Strange and Winslow, filed either formal answers or disclaimers. The bill was taken *pro confesso* as to Thorburn. The Bank of Cape Fear in its answer admitted that the conveyance by McMillan to Strange and Winslow was in trust, to secure a debt due to it, and that some of the property so conveyed had been originally assured to the partnership. As to whether or not any part of that which was assured to McMillan was purchased with partnership funds, it denied any knowledge, and put the plaintiff to the proof of it. The bank alleged that it was a purchaser for value without notice. Strange, in his answer, alleged the same facts, and submitted to such a decree as should indemnify him.

Gaston and Hogg, for the plaintiff.

Badger, for the Bank of Cape Fear.

HENDERSON, J. This bill is filed by one who claims to be a creditor of the firm of Donaldson, McMillan & Company, and also the assignee of Thorburn, the surviving partner of that firm. Its object is to reach certain real estates, mortgaged or conveyed in trust by McMillan, one of the partners, to secure an individual debt before that time owing by him to the de-

fendant, the Cape Fear Bank. It alleges, and it is admitted in the answers, that some of the land was held by the copartnership under legal titles vesting the estate in it. The bill also alleges that there were other lands, the legal title whereof was in McMillan, but that he held them in trust for the firm, having purchased them with the copartnership funds, and for its benefit. The defendants put the plaintiff upon proof of this trust, and allege that if there was one, they are purchasers for value and without notice.

As to that part of the property the legal title of which is in the company, the defendant has not the shadow of a claim until the debts of the firm are paid. Property thus situated is entirely unlike an ordinary joint-tenancy. The partners have no moieties; the property resides in the company, not in the individual copartners. Each has only a contingent right to a part after the debts are paid and the copartnership ended; and, therefore, the transfer of one of the partners only passes that contingent right. The copartnership takes the entirety; to pass anything but the contingent right, that is, to pass the estate, the firm must convey, for that is the owner. It is something like an estate granted to husband and wife; they take by entireties, and not by moieties. If the husband grants one half or the whole, nothing passes but by estoppel, and if the wife survives him she takes the whole, notwithstanding the grant of the husband; for she is not bound by his estoppel. If, therefore, McMillan is indebted to the firm to the value of this property, the defendant can claim nothing until the debt is satisfied. If the land, the legal title to which vested in McMillan, was not held in trust by him for the copartnership, very clearly the plaintiff has no right. If it was so held the defendant took it, subject to that trust, unless he discharges himself from it. He says that he is a purchaser for value, without notice. From the case, as it appears at present, I am inclined to think that the defendant, the bank, is not a purchaser for value, but a mere incumbrancer. For what value did the bank pay for the trust? Nothing; it was to secure a debt contracted before the trust was contemplated. As regards expenditure, the bank stood after as it did before the deed. Had the bank purchased with an antecedent debt, and no matter how old (I use the word "purchased" in its vulgar sense), the extinguishment of the debt would have been value sufficient. Here the debt remains as it was before the conveyance. Had the bank even released indorsers, I presume it would have been sufficient. But the court

can not decree for the plaintiff as a creditor because he has not obtained a judgment; he can not pursue the property in the hands of the bank without obtaining a lien upon it. He appears as a mere creditor, and nothing is clearer than that a mere creditor can not pursue his debtor's property in the hands of a third person. Nor can he sustain his claims as assignee to McMillan's part of the property held by the copartnership without showing that McMillan was indebted to it. However strong the evidence of this fact may be, unless the personal representatives of McMillan are before the court, we can not examine into it. His insolvency and intestacy will not do in a case like this; for upon his indebtedness depends the plaintiff's right. Neither is the defendant prepared for a hearing. It is quite probable, indeed, I am almost satisfied of the fact from the uniform practice, that the bank had indorsers for McMillan's debt who were discharged upon taking the trust or mortgage. I am unwilling, therefore, in a case so important as this, finally to decide it in its present state, but would recommend that it be remanded for the purpose of making amendments, and preparing proofs.

By Court. Let the cause be remanded to the court below, each party paying their own costs in this court.

Cited with approval to the point that a mere creditor can not pursue his debtor's property in the hands of a grantee thereof, in *Bethell's Exrx. v. Wilson*, 1 Dev. & Bat. Eq. 610; in *Britain v. Quiett*, 1 Jones Eq. 328, to the point that a court of equity will not lend its aid to a creditor in the collection of his debt until he has established it by a judgment at law; to the point that a creditor who takes a mortgage to secure an antecedent debt is not treated as a purchaser for value without notice, in *Holderby v. Blum*, 2 Dev. & Bat. Eq. 51; in *Potts v. Blackwell*, 4 Jones Eq. 58; and in *McKay v. Gilliam*, 65 N. C. 130; and in *Ross v. Henderson*, 77 Id. 170, to the point that a partner can by his own deed convey only what interest he has in the partnership property.

It was decided in *Coles v. Coles*, 8 Am. Dec. 231, that one partner can convey no more than his own interest in real estate, even where it is held for purposes of the partnership. In *James v. Morey*, 14 Am. Dec. 475, held that a mortgagee is not entitled to protection as a purchaser.

WILLIAMS v. HELME.

[1 DEVEREUX'S EQUITY, 151.]

SURETY MAY RETAIN FUNDS IN HIS HANDS BELONGING TO THE PRINCIPAL DEBTOR, upon the latter's insolvency; and an assignee of the principal debtor has, in such case, no better right to such funds than his assignor would have.

THE bill alleged that plaintiff's intestate was bound as surety for defendant, Helme, in a large amount, and was at the same time indebted to him in the sum of one thousand four hundred and ninety-one dollars and thirty-three cents. That Helme, who was anxious to collect his debt, brought suit for that purpose; but plaintiff, who wished to retain that sum as a partial indemnity against the suretyship of his intestate for Helme, endeavored to prevent him. It was finally agreed between them that plaintiff should confess judgment for the debt with a stay of execution for three months. That after the confession of this judgment, Helme became insolvent, and executions thereupon issued against him, and plaintiff paid the sum of four thousand eight hundred and seventy-seven dollars and eighty-seven cents on a judgment which had been entered up against them on a debt for which his intestate had been bound as a surety for Helme. The bill charged that Helme, instead of satisfying the judgment for one thousand four hundred and ninety-one dollars and thirty-three cents, by applying the amount of it to the sum thus paid as his surety, assigned the judgment to the defendants, Washington and Thompson, in payment of a debt due to them; and that they, in the name of Helme, had issued an execution, and were about to raise its amount out of assets in plaintiff's hands. The bill prayed for an injunction and a discovery. All the defendants answered, but the proofs did not materially vary the case made by the bill. It appeared from the answer of Washington and Thompson that the assignment to them was made before the payment of the four thousand eight hundred and seventy-seven dollars and eighty-seven cents by the plaintiff.

Badger and Devereux, for the plaintiff, were about to argue the case, but the court called on the counsel for the other side.

Seawell and Gaston, for the defendants, argued that sureties are not entitled to any peculiar favor in a court of equity. That a surety will be compelled to do everything that he undertook to do, and can by no possibility have a higher equity than a creditor. That the judgment was so much property belonging to Helme which he could dispose of as any other property. That the assignment was perfectly honest as respected the defendants; and they were entitled to the assistance of the court, if necessary, to secure the full enjoyment of it.

HENDERSON, J. The equity of the plaintiff arises from the

insolvency of Helme. The right of the latter to assign the judgment was lost when he became unable to exonerate the plaintiff from the thralldom in which he was placed on account of his suretyship, when Helme became unable to reciprocate the act which he required Williams to perform. I do not know a plainer equity. Indeed, it was admitted in the argument that if Williams had before the assignment actually suffered, he would be entitled to the relief which he asks. Or if he had before the assignment applied to this court to restrain Helme from transferring, that then the assignment would not avail, as it would have been made in violation of an order of the court. Williams has other equities besides those arising from actual sufferings. As a surety, he has a right to have his fears and apprehensions quieted, to be made safe from apprehended harm. He need not wait till he has suffered, because his equity arises before that time; and this seems to be admitted in that part of the argument, which rather concedes that he might have obtained an order that Helme should not assign. And as to the position that Williams should have applied to a court of equity to restrain Helme from transferring, I think that his equity is higher than any which could arise from the violation of orders or rules of court. It is independent of them; it arises from the principle first mentioned, that Helme could neither by himself nor by another require of Williams to do what he, Helme, was unable to do towards him, from the fact of his insolvency. Williams, being indebted to him, was also bound for him in a very large sum from which he sustained a loss of double the amount of the sum which Williams owed. The debt which the plaintiff owed should have been left in his hands as an indemnity in part for his loss. It is true that if the judgment had been of a negotiable character, it would have been proper to have applied to a court to restrain its negotiation; for had it been of that character, Williams might have had a legal owner to contend with, one who stood upon his own right, instead of those of another; and who would not, as these defendants, represent the original creditor, and be bound by every obligation which was imposed upon him. The defendants say it might possibly be different if they were suitors to the court; but they are not; they ask nothing of this court. In this they are mistaken; they are applicants for a favor, in the character of defendants. The law gives them nothing; their rights are not known at law. They would not be even heard to allege them; there, Helme is still the owner of the judgment. Here the defendants are made

parties by mere courtesy. The plaintiff might have left them to come into this court as petitioners, asking to be permitted to use the name of Helme. They owe their existence as claimants to the principles of this court, and they ask to do, in the name of their assignor, what it would be the height of iniquity to permit him to do, because they say that the latter sold to them, but Helme had nothing that he could sell. I think, therefore, that the injunction should be perpetuated.

I have viewed the case as if Helme intended no actual fraud, when he assigned to the defendants. He says so, and there is nothing to induce a belief that he did; but the fact is, that he was then insolvent, and, therefore, could pass nothing in the judgment as against the plaintiff.

TAYLOR, C. J. I am of opinion that the prayer of this bill could not be rejected without violating very clear principles of natural justice, and subverting that series of decisions by which this court has been constantly guided, for the protection of sureties. It is not controverted that the estate of the plaintiff's intestate, who was surety for Helme, became liable to pay a considerable sum for him, a very short time after the confession of judgment, and that this money was subsequently paid out of the estate. It is very evident, that if Helme had determined to enforce the judgment upon the expiration of the stay, he would have been enjoined, unless he countersecured the estate against his own debts. When the debts of Helme were paid out of the estate, his debt against it was extinguished, according to such plain principles of justice, that I imagine the law of every civilized nation has adopted them. In the civil law, it was called compensation, and is thus spoken of by a writer on that law. "When it is said that compensation is made *ipso jure*, it means that it is made by the mere operation of law, without being pronounced by the judge, or opposed by the parties. As soon as a person, who was creditor of another, becomes his debtor of a sum of money, or other matter susceptible of compensation with that of which he was a creditor, and *vice versa*, as soon as a person who was a debtor to another, becomes his creditor of a sum, susceptible of compensation with that of which he was a debtor, a compensation is made, and the respective debts are from thenceforth extinguished, to the extent of their concurrence, by virtue of the law of compensation:" Pothier on Obligations, 599. As the civil law exists in Scotland, the principle is there adopted without variation, and it is held that where the same person is

both debtor and creditor to another, the mutual obligations, if they are for equal sums, are extinguished by compensation: Erskine's Institutes, 325.

Williams had a well-ascertained equitable right against Helme, before payment of money for him, and might have called upon him in this court to relieve him from his liability, by payment of the debt, and certainly would have been allowed to set off the judgment against it. The case of *Lee v. Rock* furnishes an instance where a man borrowed money on the mortgage of his estate for another, of his being allowed to go into equity, to have his estate disincumbered by him, and the covenant in the mortgage-deed was held to bind the defendant, though no party to it; but the money being borrowed for him, it was his debt, and the surety was only a nominal person: Mosely, 319. And he may not only come here to be relieved from his liability, but as soon as he becomes liable to the creditor, or is endangered, though he has not paid the debt, he has a right to enforce mortgages, or other counter-securities given to indemnify him: *Antrobus v. Davidson*, 3 Merivale, 579; *Tankersley v. Anderson*, 4 Dessau. 44. This was the relation in which Williams stood to Helme immediately after the confession of judgment, and when the true state of the latter's affairs were known. This equity was prior, then, to any which could be acquired by the assignees of the judgment; but there was, in fact, no equity to be acquired by them, for it would be against first principles that the assignor should place the assignee in a better situation than he stood himself. Policy has introduced an exception, with respect to bills of exchange, and notes indorsed before they are due; but in all other respects, the rule and law of this court are on that subject universal: *Coles v. Jones*, 2 Vern. 692; *Davis v. Austen*,¹ 1 Ves. jun. 247.

As many of our most valuable principles of equity, as well as law, are derived from the civil law, it is not surprising to meet with almost the very case before us, stated in a work of authority on that law, as administered in Scotland. "Though," says the writer, "compensation can not be pleaded after the decree, either against the creditor or his assignee, yet, if the original creditor should become bankrupt, the debtor, even after decree, may retain against the assignee till he give security for satisfying the debtor's claims against the cedent:" Erskine's Institutes, 328.

By COURT. Let the judgment be made perpetual, with costs.

1. *Davis v. Austen*.

Approved and followed in the following cases: *Battle v. Hart*, 2 Dev. Eq. 31; *Green v. Crockett*, 2 Dev. & Bat. Eq. 390; *Long v. Barnett*, 3 Ired. Eq. 63; cited in *Allen v. Wood*, Id. 336, to the point that where a plaintiff is seeking contribution from a co-surety, his equity lies in the insolvency of the principal; and in *Mosteller v. Bost*, 7 Id. 39, to the point that an assignee can not be placed in a better position than his assignor.

LILES v. FLEMING.

[1 DEVEREUX'S EQUITY, 185.]

POST-NUPTIAL AGREEMENT BETWEEN HUSBAND AND WIFE, made upon sufficient consideration, will be enforced in equity.

WIDOW'S RIGHT TO A CHILD'S PART OF HER HUSBAND'S PERSONAL ESTATE is one which the law gives, and an intention to exclude that right must be shown either by express words or by a manifest implication, otherwise she is entitled to the child's part.

THE bill alleged that upon a treaty of marriage between the plaintiff and the defendant's testator, it was agreed by the latter that in case there should be a child of the marriage, all the property of the plaintiff should be settled upon her. That a son was born to them, who was called Richard Liles; and, thereupon, defendant's testator executed the following instrument: "Be it known to all whom it may concern, that I, Jacob Liles, of, etc., having intermarried with Frances Holland, widow, etc., and by her having had one son, called Richard Liles, I do hereby certify that all the property which came by my said wife, of every description, I give to her and her heirs forever. In witness," etc. The bill then charged that the defendant's testator had reduced to his possession sundry slaves, bonds, and moneys which belonged to her before her marriage. That he had bequeathed several of those slaves to his children by a former marriage, and had made for her a very small provision, from which she had regularly entered her dissent. The bill prayed to have the defective instrument set up, and also for a distribution of the assets of the testator.

In their answers, the defendants put the plaintiff to the proof of the ante-nuptial agreement, and insisted that, if it was made, she should be put to her election, claiming that she could not claim under the agreement and also her share of the testator's assets. The facts alleged in the bill were fully established by the testimony of plaintiffs, mother and sister.

Devereux, for the plaintiff, contended that the right of the widow to a child's part of her husband's personal estate was

a right which the law gave her. That it was similar to the right of dower at common law, and that it had always been held that nothing but express words or the most necessary implication should bar the right of dower.

Haywood, for the defendants.

TAYLOR, C. J. This bill is brought for the twofold purpose of setting up a contract made by the testator of the defendant with the plaintiff, his then wife, whereby he gave her all the property which he had acquired by his marriage with her and to obtain likewise a distributive share of the personal estate of her said late husband. The contract made after marriage is stated to have been in execution of a parol treaty made before the marriage, whereby the husband agreed to settle upon her, in the event of her having a child by him, all the property she then possessed or was entitled to. The writing does accordingly admit that she has a son, named Richard Liles; and there is proof by two witnesses, the mother and sister of the plaintiff, that Jacob Liles had declared in his life-time that he had executed the paper in pursuance of his engagement entered into before marriage. The contract of marriage is a valuable consideration, and a settlement made by the husband after marriage is binding upon him and all persons claiming as volunteers from or through him. How far the peculiar circumstances of this contract would render it valid against creditors or subsequent purchasers, is not made a question in the case. The intervention of a trustee is indispensable at law to enable the husband to convey property to his wife; but there are several cases in this court where the husband's gifts to the wife, directly made, will be supported, although no property in the things given passed to the wife at law by delivery. The following cases extend fully to the establishment of this principle: *Lucas v. Lucas*, 1 Atk. 270; *Stanning v. Style*, 3 P. Wms. 338; *Bledsoe v. Sawyer*, 1 Vern. 244,¹ *Bunbury*, 205. The law proceeds strictly upon the notion of union of person in husband and wife, and it is only in some extreme and excepted cases that the wife can implead or be impleaded without her husband; but in equity she may be a plaintiff or defendant, without the concurrence of her husband, as in cases where she prays relief against him: *Terry v. Terry*, Pres. Ch. 275;² *Lambert v. Lambert*, 1 Ves. jun. 21.³ And she may defend a suit separately when her interest in the subject of litigation is contradictory to

1. *Bledsoe v. Sawyer*, 1 Vern. 244.

2. S. C. Gilb. Eq. R. 10.

3. *Lampert v. Lampert*, 1 Ves. jun. 21.

her husband's claim, and in other instances: *White v. Thornborough*, Pres. Ch. 429;¹ *Ex parte Halsam*, 2 Atk. 50. Equity, it is said, regards not the outward form, but the inward substance and essence of the matter, which is the agreement of the parties upon a good and valuable consideration; so that although a covenant be extinguished at law by the marriage of the parties, this court will establish it: *Cannel v. Buckle*; 2 P. Wms. 243; 1 Foubt. 39.

As to the remaining question, whether the plaintiff is to be put to her election, it is believed that the law has left no discretion on the subject; for, however desirable it might be, that in so small an estate the testator's children should exclusively enjoy the benefit of it, yet the widow's claim to distribution is founded on a clear legal right. The principle to be extracted from all the cases is that an intention to exclude that right must be shown either by express words, or a manifest implication; but there is here nothing from which such an intent can be inferred.

By Court. Declare that the defendant's testator made the agreement in the bill mentioned, and direct an account of the property of the plaintiff at the time of her marriage, and also of the assets in the defendant's hands.

McAULEY v. WILSON.

[1 DEVEREUX'S EQUITY, 276.]

WHERE INTENTION OF TESTATOR CAN NOT BE LITERALLY FULFILLED, a trust results for the heir or next of kin; the doctrine of *cy pres* does not prevail in North Carolina.

WHERE TESTATOR BEQUEATHED PROPERTY FOR THE SUPPORT OF A MINISTER who was to preach to a congregation at a certain meeting-house, but the congregation of such meeting-house refused to allow such minister to preach in their meeting-house, the bequest fails, although the party to whom such minister belonged offers to build another church near the one named by the testator.

THE bill of the plaintiffs, McAuley and Beard, as "trustees of the Congregation of Gilead," alleged that William Henderson, and others, erected a meeting-house upon land which was conveyed to him, and others, in trust for the members of the Associate Reformed Synod, belonging to the Presbyterian Congregation of Gilead. That some time after Henderson and

others separated from the Associate Reformed Synod, and became members of a society called the Associate Seceding Presbyterians. That, as the meeting-house had been built at the joint expense of these denominations, it was agreed that both might use it for public worship. That Henderson, in his will, by which he made the defendant, Wilson, his executor, devised a certain tract of land to be sold, and the income derived from the funds for which it should be sold, to be applied to the support of a minister, who was to preach at the seceding meeting-house called Gilead. That plaintiffs had been duly elected trustees of the Associate Seceding Congregation, and believed themselves entitled to the use of the Gilead meeting-house equally with the Associate Reformed; but if they were mistaken in this, they had procured a conveyance of an acre of land and were about to erect a church for their congregation within six poles of the meeting-house described by the devisor.

The bill prayed that the charity created by the will be established, and the interest paid to the plaintiffs to support a minister to preach in the old meeting-house, or that the trusts be executed *cy pres*, by appropriating the interest to the support of a minister to preach in the new meeting-house.

The plaintiffs, John Henderson, and others, were the heirs at law, and next of kin to William Henderson. In their bill they allege that the land on which the meeting-house at Gilead was built belonged to the Associate Reformed Presbyterians, and that the Associate Seceding Presbyterians did not exist as a body at Gilead, and had no right to the use of the meeting-house; that there was no possibility of carrying the devise into effect; and they prayed that the executors might be directed to pay the trust-fund over to them.

The defendant, the executor of William Henderson, admitted the sale of the land mentioned in the will, rendered an account, and submitted to any decree, by which he would be indemnified.

Replications were filed, and testimony was taken showing the difference between the two parties in the church, and that the Associate Reformed party had passed a resolution to have the meeting-house kept for the sole use of that party.

Gaston, for plaintiffs, McAuley and Beard.

Wilson and Badger, for the heirs.

Seawell, for the executor.

HENDERSON, J. This is not a devise to a religious congregation, within either the words or the spirit of the act of 1796: Rev. Ch. 457. The property is not given to the congregation, to be used by them as they may think proper, for their use and benefit; but it is given for a special purpose, in which, to be sure, they are interested, but are not the owners, to wit: To pay a preacher of a certain sect to preach to the congregation called Gilead. They take, therefore, as trustees, or *cestui que trusts* (which is matter of indifference, the objection not being to the form), for a specific purpose, and are bound to apply the funds to that and to no other use. The validity of the devise depends on the question, whether the devisees are accountable to any one, for the due execution of the trust; for if they are not, it is void, and there is a resulting trust for the heirs at law, or next of kin. If there is any one who can compel the due execution of the trust, that is, the proper application of the trust fund, according to the directions of the devisor, then it is a valid trust, at least so much of it as is necessary to answer the intent of the founder. If there be more than is necessary for that purpose, the excess results to the heirs at law, or next of kin. For we do not, as they do in England, apply it to other objects of a similar kind, by what is called the doctrine of *cypres*.

We are relieved from the consideration of the question, whether there is in this case any person competent to enforce the due execution of the trust; for we think that those for whose benefit it was intended, have refused, and still refuse, to accept the testator's bounty. We certainly cannot impose it on them, for the congregation have the right to employ their own preacher and to pay him in their own way. The testator has left us no guide to ascertain what is to be done in such an event. Nor do we know, but from conjecture, whether, as the congregation, who have the appointment of the minister and the control over the church at Gilead, have refused to accept his bounty, it was his desire that it should be given to a part of the congregation who accord with him in religious sentiments, and who are willing to build another church near to the church at Gilead, and employ the funds in paying a preacher of that sect, directed by the testator. It is very probable that the testator would have directed this, had he foreseen the refusal, as the thing next best to that which he most wished. But he has not said so, and it is out of the power of this court to speak for him. We can not dispose of the property of the deceased by undertaking to conjecture what would have been his will.

provided he had foreseen what has since happened, which has thwarted his intent as expressed. If I was left to conjecture, I would say such was his will, but my argument to prove it would result in nothing like certainty. It would be this, that as the thing offered to be substituted bears a very strong resemblance to that directed which can not be performed, it is probable he would have accepted the substitute, because it comes near to the thing directed. But it may be that every circumstance, in which the proposed substitute differs from the original directed, may have been the testator's sole object in making the bequest, viz., wish to have a preacher of his tenets to preach to the whole congregation at Gilead, and thereby bring them over to his faith, and prevent the dissemination in that church of what he deemed unsound doctrines. I do not say that most probably this was his intent; it is sufficient if it may have been, or anything else but the precise proposition made by the plaintiffs. If I were left to my own conjectures I would say that, in the events which have happened, the proposition made by the plaintiffs is the thing which he would have directed; for it is fair to presume that his object was the dissemination of the doctrines of his faith; that he selected the church at Gilead as the place of preaching, and the congregation there as the one to be preached to; but that they were pointed out only as the means of effecting the end. But if these means fail, the end was not to be lost, but the next best means, and those bearing the strongest resemblance to those pointed out, should be resorted to.

This reasoning is all fair, and if we were correct in the object, would be satisfactory ground for a decree in favor of the plaintiffs. But when we recollect that we assume the object which he had in view, that it is incapable of proof; for he who only can speak in regard to it, has spoken for the last time, by this his last will, to which only we can look for his intent, and on this subject that he is silent; we must remain in ignorance of his intent further than he has declared it, and this furnishes only ground for conjecture, on which we can not act.

HALL, J. It would seem that the object of the testator was to reconcile and unite, in principle, the two sects, one of which is called "The Associate Seceding Party," the other, "The Associate Reform Party." To the first party the testator belonged; the church of Gilead belonged to the latter. The testator directs that his property shall be formed into a fund to pay a preacher of his own religious principles to preach at the

church of Gilead. That church have rejected any benefit that was intended for them by that devise; they will not accept of it. The testator's own party, the Associate Seceding Presbyterians, pray the benefit of it, and that it may be vested, *cy pres*, in a church erected by them very near to the church of Gilead. This, we think, can not be done; as the object of the testator can not be effected, we can not direct the fund to be applied to any other.

By COURT. Let the bill of the plaintiffs, McAuley and Beard, be dismissed; and on the bill of the heirs at law and next of kin, let an account be taken, and let all costs be paid out of the fund.

To the point that the doctrine of *cy pres* is not recognized in this state, cited in the following cases: *Holland v. Peck*, 2 Ired. Eq. 255; *Bridges v. Pleasants*, 4 Id. 26; *Lemmond v. Peoples*, 6 Id. 137; *Faribault v. Taylor*, 5 Jones Eq. 219.

That the powers exercised by the court of chancery, in England, under the doctrine of *cy pres*, are not and can not be exercised in this country, see note to *Dashiell v. Attorney-general*, 9 Am. Dec. 583.

POINDEXTER v. McCANNON.

[1 DEVEREUX'S EQUITY, 373.]

WHERE IT IS DOUBTFUL WHETHER A TRANSACTION WAS INTENDED AS A MORTGAGE, or as a conditional sale, courts of equity incline to consider it a mortgage; but where subsequent acts of the parties are consistent with the idea of a sale, it will be treated as such.

THE bill was filed to redeem a slave, which, the plaintiff alleged, he mortgaged to the defendant, McCannon, who sold him to the other defendant. It alleged that the plaintiff, being indebted to McCannon, mortgaged to him the negro in question, then worth five hundred dollars, for four hundred dollars; that a bill of sale, expressed to be in consideration of four hundred dollars, was made, and the negro put in possession of McCannon, upon an agreement that his hire should extinguish the interest. The deed, which was absolute on its face, was exhibited by the defendant. On it there was the following indorsement: "N. B. If the above-bound T. W. Poindexter pay up to the above-named McCannon the sum of four hundred dollars within twelve months from the date hereof, the above bill of sale to be void, and the negro boy returned." Plaintiff also alleged that

he had tendered to the defendants the amount due, which they refused.

McCannon's answer admitted the bill of sale and the *nota bene*, but positively denied that it was a mortgage. It alleged that plaintiff wished to give a mortgage, but that McCannon refused to treat with him on that footing, but finally it was agreed that the plaintiff should sell and that McCannon should agree to resell, as mentioned above; that plaintiff owed him some money; that he paid to him a further sum of money at the time of the sale, and gave him an order on his father's executor for the balance, and also surrendered to him the evidences of the previous indebtedness; that he had paid the plaintiff the amount of the said order, and had offered to the plaintiff to rescind the contract and return the slave, but plaintiff told him he might sell the negro, as he was unable to re-purchase him, and thereupon he sold him to Hauser, the other defendant, for the same price that he had paid for him; that in order to give plaintiff further time, he annexed to the bill of sale a similar condition to that contained in the one to himself; and that both he and Hauser considered the latter transaction to be a sale. Hauser's answer corroborated that of McCannon.

Winston, for the plaintiff.

Gaston and Devereux, for the defendants, cited Coke L. 205, a; *Bonham Newcomb*, 1 Vern. 7, 214, 232; *Mellor v. Lees*, 2 Atk. 494; *Vernon v. Winstanly*, 2 Sch. & Lef. 393; *Goodman v. Grier-son*, 2 Ball & Bea. 274; *Conway v. Alexander*, 7 Cranch, 218.

RUFFIN, J., after stating the case as above, proceeded: A mortgage and a conditional sale are nearly allied to each other, and it is frequently difficult to say whether a particular transaction is the one or the other. The difference between them is, that the former is a security for a debt; and the latter is a purchase for a price paid, or to be paid, to become absolute on a particular event; or a purchase accompanied by an agreement to resell upon particular terms. It is the latter kind that runs so nearly into a mortgage. For as needy and distressed men are those who are commonly drawn into such contracts, and the very anxiety to get their estates again, which produces a stipulation to that effect, denotes either that it was favorite property, which the party did not intend to part from conclusively, or that the price was so inadequate as to make it material, in point of interest, that they should have the power to reclaim. Courts lean towards considering them mortgages.

But there is no rule of law that a sale shall not be made conditionally. In each case, the only difficulty is to ascertain the character of the transaction. When it is once determined to be a mortgage, all the consequences of account, redemption, and the like, follow, notwithstanding any stipulation to the contrary. For the power of redemption is not lost by any hard conditions; nor shall it be fettered to any point of time, not according to the course of the court. This is well expressed in the familiar maxim, "Once a mortgage always a mortgage."

In the present case, the clause inserted in the deed may well consist with a contract of either description. It is equivocal in itself. But it is sufficient to induce the court to decree a redemption, if nothing else appeared, because the court inclines to that side, to prevent oppression and hard dealing. It is, however, susceptible of variation by the acts of the parties, and the circumstances attending the transaction, which show it to be the one or the other. I do not mean that it can be contradicted by the testimony of witnesses, to show either that the bargain was different from that expressed, or that it was meant to be, unless there be fraud. But I mean that the parties' acts and their dealings are material to show the intent. *Streator v. Jones*, 3 Hawks. 423, for instance, is a case where an absolute deed was held a security, upon evidence of lending and borrowing, between a needy man on one side, and an habitual and hard lender on the other; of great inadequacy of price, if it was a price; and of the possession of land by the bargainor after he made the deed. As Sir James Mansfield says: *Iggulden v. May*, 2 New Rep. 449, the conduct of the parties can never be looked to, to fix a construction at law upon their deeds, as had been done in *Cooke v. Booth*, Cowp. 819. But in equity, their conduct is often regarded as evidence of the intent of making a contract.

Now, what are the usual badges of a mortgage? They are, that there is a previous debt, or a present advance of money upon loan, for which some evidence is taken, obliging the borrower personally to the absolute payment. There is a bond for the debt; or a covenant in the mortgage deed for the payment. This is usual, where the security by mortgage is taken on landed property. Much more should we expect to find it where the security is on a slave, who may die the next day. It is always a question in mortgage or no mortgage, whose loss will it be if the thing is destroyed. If that of the maker of the deed, then it is a mortgage. Again, one of the most difficult

situations that can be, is that of a mortgagee in possession. He is subjected to an account, generally the most rigorous, and under great disadvantages; for he is liable not only for profits made, but that might be made; and profits are always greater to standers by, who have a high opinion of their own management than they are in reality to those who work. Hence, a mortgagee never takes possession until he is obliged. Nor is a mortgagor more willing to go out of possession, and give up the management and present use of his property. The one does not surrender nor the other take possession but as the last alternative. And we may almost venture to assert, that no mortgagee or mortgagor ever yet made a contract upon which the possession was to change immediately, unless it were the veriest grinding bargain that could be driven with a distressed man, who had no way to turn. When to this is superadded that a fair and full price, four hundred dollars, was paid, it seems impossible to believe that it could be on loan.

That this price was paid, is fully proved by the plaintiff's own brother, who was present at the treaty, and wrote the deed. I do not refer to his deposition, for the sake of what he says was the understanding of the parties; though in that respect he supports the answer; but to get at the acts of the parties, he proves that they came to a settlement, not to ascertain the debt due the defendant, that it might be secured, but to ascertain its amount, that it might be known how much would remain to be paid in money. Upon that settlement all the old bonds were given up and no new one taken. Part of the debt was for the price of land. Would the defendant have relinquished his equitable lien on that, for the precarious security of a mortgage on a slave, for that and other advances to the full value?

The defendant likewise took immediate possession. Here, then, it appears that instead of a security for a debt, the slave was partly a satisfaction of a pre-existing one; and the balance was then paid. If the plaintiff had been borrowing, and pledging his negro as security, would he have received so large a part of the loan in an order? Such a payment might be expected to be received. But such a loan is out of the way of business. The subscribing witness is supported by several others in his statement of the value of the negro, and of the defendant's possession. The sum advanced was the full value. These circumstances satisfy me that a redemption was never intended. And the sale by McCannon to Hauser at the same

price removes every appearance of it. He might have taken the negro in payment, and advanced the difference, because he could then sell himself again after a reasonable time. But the idea is preposterous that a man who was himself obliged to raise money would surrender a good security on land, for the purpose of getting a mortgage on a negro, which, as mortgaged property, he could not sell. Without citing particular cases, I will only refer to the general principles collected from them by Mr. Butler, in his note to Co. Litt. 205, a. The circumstances here repel every idea of a mortgage, or of a security redeemable at an indefinite period. The old securities were given up, and no new one taken; the price paid was a full one; the purchaser himself was necessitous, and obliged to part from property to pay his own debts: he took immediate possession, and actually made sale of the negro the day after that limited for the plaintiff's re-purchase; and upon such sale only got his own money back; and this was twelve years before this suit was brought. If this can not be considered a purchase, then there can be none, unless it be absolute at the making up of it and forever. The plaintiff has no case, and his bill must be dismissed with costs.

Per CURIAM. Let the bill be dismissed, with costs.

Approved in the following cases: *Munnerlin v. Birmingham*, 2 Dev. & Bat. Eq. 358; *Gillis v. Martin*, 2 Dev. Eq. 470; *Newsom v. Rolls*, 1 Ired. Law, 179; *McLaurin v. Wright*, 2 Ired. Eq. 94.

KEATON v. COBB.

[1 DEVEREUX'S EQUITY, 439.]

PURCHASE OF TRUST ESTATE AT SHERIFF'S SALE BY A FRAUDULENT TRUSTEE, pending litigation between him and his *cestui que trust*, confers no title; and the sheriff's deed can stand only as a security for what was advanced upon the execution.

CESTUI QUE TRUST WHO INCURS COSTS AT LAW in defending against his trustee a title purely legal, instead of coming at once into the proper forum for redress, can not recover such costs in equity; but he is entitled to re-payment of the costs paid to the trustee.

THE bill alleged that the plaintiff, Elizabeth Keaton, and the defendant, Mary Cobb, being sisters, before their marriages purchased jointly a lot of land, and contributed equally to the payment of the purchase-money. That the plaintiff being at the time a minor, the deed was made to Mary, who was of full

age; that the plaintiff, Elizabeth, and the defendant, Mary, agreed with their father that if he would assist them to build a dwelling-house on said lot, he and his wife might live in it during their lives; that the house was built pursuant to such agreement, and all the parties lived in it together until the marriage of defendant, Mary, with defendant, Cobb; that previous to said marriage the plaintiff, Elizabeth, applied to her sister to execute to her a deed for her undivided moiety; that her sister then acknowledged Elizabeth's right in the fullest manner, and informed her that defendant's husband could not deprive her of the possession of the lot.. The plaintiff being perfectly satisfied with this assurance, no deed was executed; that soon after the marriage of defendants, defendant Cobb, pretending to be ignorant of the agreement between the sisters and between them and their parents, commenced an action of ejectment, and having obtained a verdict and judgment, was proceeding to execute a writ of possession. The bill prayed for an injunction, and for the repayment of the costs at law. The defendants denied all the allegations of the bill, and as a distinct defense, defendant Cobb alleged that since the controversy about the lot had arisen, he had purchased whatever interest the plaintiff, Keaton, had therein, for eight dollars and fifty cents, under a judgment and execution. Upon the coming in of the answers, the injunction granted on the filing of the bill was dissolved, and defendant, Cobb, put in possession. On the hearing the allegations of the plaintiffs were fully supported.

Badger and Mordecai, for the plaintiffs.

Haywood, for the defendants.

RUFFIN, J. The agreement charged in the bill for the joint purchase of the lot in dispute by the two sisters, and the payment of the purchase-money, and of the cost of putting the buildings on it by them equally, though denied in the answer, are facts proved beyond a doubt by the depositions. A conveyance to the plaintiff of one half must, therefore, be decreed.

It is, however, stated in the answer that Cobb has purchased at sheriff's sale the estate of Keaton, the husband; and it is insisted that precludes the plaintiff from any relief. At most, that purchase would extend only to the life-estate of the husband, and would not affect the fee of the wife. But even that effect can not be allowed to it. Here is a trustee who denies the right of his *cestui que trust*, and brings an ejectment to evict

him, and during the litigation and doubt cast on the title by the trustee himself, purchases under execution at a price enormously inadequate. To allow him to hold under such a title would be to encourage iniquity. The sheriff's deed can only stand as a security for what the defendant advanced upon the execution. It does not appear whether the costs of the suit at law have been paid. It is to be presumed they have, as the injunction at first granted was dissolved upon the coming in of the answer. The plaintiffs now ask for an account of those costs, and to have refunded what they have paid to the plaintiffs at law, and to recover their own costs at law. Certainly they must get back the costs of the ejectment paid to the plaintiffs in it. Nothing can be plainer than that Cobb and wife ought not to have used their legal title in that way, and they must be content to do it at their own expense; for the plaintiffs never denied their title to a moiety. In this particular case, the gross oppression attempted by the defendants prompts us to go as far as we can to make them pay all the costs wherever any can be found. But we can not yield to our feelings against principle. The title of the plaintiffs was not legal, though a clear one in this court. If a party in that situation chooses to contend at law without resorting at once to the forum in which alone he can properly be redressed, he must not expect to recover his costs unless he succeeds at law. He chooses his game, and must put up with his luck. If it was wrong in the defendant to bring ejectment, he must bear the burden of the costs incurred by him. And it being equally wrong in the plaintiff to rely upon a bad title, in a court which could not investigate and sustain his real rights, he must likewise be out of pocket the money he has spent in that fruitless defense. It is much to be regretted that ignorant and poor people should be advised to such long, expensive, and fruitless litigation; for I dare say they knew no better. But we can not help them without holding out an encouragement to others to keep at law for the sake of it, instead of putting their cases at once upon the merits.

As to the rents and profits, it is to be remarked that by the contract charged in the bill, and proved by the witnesses, between John Sasser, the father, and his two daughters, the father and mother were to enjoy and occupy the premises during their lives as a home. This was in consideration of his erecting the houses, which he did. It is not a question now how this might be treated by the father's creditors. But as between the par-

ties, there can be no rent during the occupation by either of the parents. From that period, however, each sister is liable for rent received by her, or for a reasonable rent during their own exclusive occupation respectively, as to which an account must also be taken.

By COURT. Declare that the agreement between the plaintiff, Elizabeth, and the defendant, Mary, for the joint purchase of the lot in dispute, and for the erection of houses on it at their joint expense, as charged in the bill, is fully proved. Declare further, that said Elizabeth paid one half of the purchase-money for said lot, and of the expenses for erecting buildings on it, and that she is entitled to one undivided half of the said lot; and decree, that the defendants convey to the plaintiff, Elizabeth, one undivided moiety of the said lot, with the appurtenances, in fee-simple. And let it be referred to the clerk to take an account of such moneys as may have been paid by the plaintiffs to the defendants, as the costs of the suit at law, and let him state any balance due thereon; and order, that the defendants desist from proceeding on their execution for such balance, if any there be; and order the plaintiffs to be entitled to recover back any such costs as the defendants may have received, as aforesaid; and let it be referred to the clerk to take an account of the rents received by either of the parties for the premises; and also of the reasonable annual value of the said lot, while in the occupation of either of the parties, since the death of Elizabeth Sasser, the elder.

Cited to the point that costs will not be allowed to a plaintiff who incurs them at law, when he ought to have first come into a court of equity, in the following cases: *Newsom v. Bufferlow*, 2 Dev. Eq. 67; *Murphy v. Grice*, 2 Dev. & Bat. Eq. 199; *Allen v. Gilreath*, 6 Ired. Eq. 252.

TOLAR v. TOLAR.

[1 DEVEREUX'S EQUITY, 456.]

WHERE DONOR DESTROYED VOLUNTARY DEED fairly obtained, after it was delivered to the grantee, but before it was registered, a court of equity will compel such donor to convey the same property to the donee.

THE bill of plaintiff alleged that the defendant, his father, to advance him in life, and to repay him for services rendered, conveyed to him certain lands and slaves; that the deed was delivered to the plaintiff, and by him deposited for safe keeping with one Hoptou Coor; and that the defendant afterwards got pos-

session of it by some contrivance, and destroyed it. The bill prayed that the defendant might be compelled to execute another deed to the plaintiff for the same property. Defendant denied all the allegations of the bill. The other facts are stated in the opinion.

Mordecai and Devereux, for the plaintiff, cited: *Dawson v. Dawson*, ante, 573; *Souverbye v. Arden*, 1 Johns. Ch. 240; *Doe v. Knight*, 12 Serg. & Low. 351; *Worrall v. Jacob*, 3 Mer. 256.

Gaston, for the defendant.

HALL, J. The plaintiff does not call upon the court for its assistance to supply any defect, or rectify a mistake in the voluntary deed of gift, which is the subject of the present dispute, but to restore him to the evidence of a legal title, the deed of gift of which he has been deprived, as is admitted in the answer, by the defendant's own conduct.

It appears that the defendant was an old man, and that his mind labored under the infirmities incident to old age; but none of the numerous witnesses examined in the case say that he was incapable of transacting his business, or of making a contract. It is clear that the deed of gift was not executed with precipitancy, but with some deliberation. Arthur Jones states, in his deposition, that he saw the defendant at his father's, and he told him he was on his way to Hopton Coor's, to get him to write a deed of gift, and that he intended to give all his property to Barden, the plaintiff. He says, further, that he and the family remonstrated with the plaintiff against the impropriety of giving all to one child. He persisted in his determination to do so, and said if Hopton Coor would not write it for him, he would get some other person to do it. He would not return until he had accomplished it. This happened two or three days before the delivery of the deed of gift. Calvin Coor says, in his deposition, that the defendant went to the house of Hopton Coor about the twentieth of February, 1821; that he appeared to be in his senses; that he wrote a deed of gift for him; that he signed it, and that he and Hopton Coor attested it as witnesses; that by the deed of gift he conveyed all the land that he had in possession, and six negroes, by the names of Dorcas, Hardy, Britton, Zeny, and Jonas; that the name of the other negro he does not recollect; that the deed was read over to the defendant; that he expressed his satisfaction with it; that it was delivered to Barden Tolar, the plaintiff; that he told the plaintiff to go and have it recorded; but that, in consequence of

something Hopton Coor said, the defendant observed it would be time enough to have it recorded after his death, and told plaintiff to let Hopton Coor keep it, upon which the plaintiff delivered it to Hopton Coor. In the most important facts stated by this witness, he is supported and corroborated by the testimony of Dorcas Coor. Arthur Jones states, that in a short time afterwards, he saw the defendant, and was told by him that he had executed the deed of gift, and that it was left with Hopton Coor.

At this stage of the inquiry, it may be assumed, that title to the property contained in the deed of gift became vested in the plaintiff; for although it had been placed in the possession of Hopton Coor, it had been previously delivered to the plaintiff, and his placing it there was his own act. The title to the property had previously passed to him. That act was not obligatory upon him. He might have had it recorded when he pleased. Several depositions have been read, to prove that the defendant, on several occasions, declared that he had conveyed all his property to the plaintiff, excepting, perhaps, his hogs, chickens, etc., and that he had no right to exercise acts of ownership over it. Other depositions have been read, to prove that he did, on various occasions, exercise acts of ownership over it, and treated it as his own. These circumstances relative to the management of the estate, prove nothing on either side. It was natural when father and son lived together that each of them should occasionally use the property, and treat it as if it was his own. It does not appear, that after the defendant had regained possession of the deed of gift, and destroyed it, which was a few days after he executed it, that the possession of the property was in any respect changed, until the plaintiff left his father's, and went to live by himself. Until then, the possession accompanied the title, whether it was in the father or in the son. After their separation, it does not appear that the father had such an adverse possession of either the land or negroes, as would give him a title under the statute of limitations.

Depositions have been read to prove that the plaintiff himself did not consider that he had a right to the land or negroes. Some of the depositions say that the plaintiff was an ignorant man. Perhaps he might have thought that his title was divested by the destruction of the deed of gift. If such was the case, his misconception of his rights should not injure him. It is admitted by the defendant, in his answer, that some days after the execution of the deed of gift by him, he went to

Hopton Coor's house and applied for it; that Dorcas Coor delivered it to him and he destroyed it. From an examination of the whole case, I am of opinion that the defendant be decreed to convey to the plaintiff all the land that he was possessed of at the date of the deed of gift; and that the master ascertain the identity of it; that he also convey to him the six negroes, with their increase since the date of the deed of gift; that he ascertain the name of the sixth negro, not recollected by Calvin Coor; and that this conveyance be made by such a deed as the master shall approve, without warranty.

By COURT. Decree accordingly.

Cited and approved in the following cases: *Morris v. Ford*, 2 Dev. Eq. 412; *Tate v. Tate*, 1 Dev. & Bat. Eq. 22; *Plummer v. Baskerville*, 1 Ired. Eq. 252; *Walker v. Coltraine*, 6 Id. 79; *Crumpp v. Black*, Id. 321; *Tyson v. Harrington*, Id. 329; *Thomas v. Thomas*, 10 Ired. Law, 123; *Smith v. Turner*, 4 Ired. Eq. 433.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

FLOYD v. BROWNE.

[1 RAWLE, 121.]

RECOVERY OF JUDGMENT IN TRESPASS *de bonis asportatis* divests the plaintiff of his property in the goods. Therefore such judgment is a bar to an action of *indebitatus assumpsit* against any one, for the proceeds of the sale of the goods, which were the subject of the trespass.

ASSUMPSIT for money had and received, brought by Floyd against Browne, the administrator of one Truxton, deceased, formerly a sheriff. Plea, *non assumpsit* and payment, and a special plea of former recovery. On demurrer to this plea, judgment was rendered for the defendant. The plaintiff thereupon took out a writ of error. The facts set out in the special plea were: Truxton levied an execution on and sold the property of Floyd in an action brought by Cridland against Green. Floyd then commenced trespass *vi et armis* against Cridland and five others who had assisted him, and recovered a verdict and judgment against Cridland and another, and had a default entered against the others. Execution was issued against all and was satisfied out of the property of one of them, who then took a writ of error. The judgment was reversed as to all, save the two who had appeared, and the execution as to all.

J. R. Ingersoll and P. A. Browne, for the plaintiff, urged that the recovery of judgment in trespass without satisfaction was no bar: 14 Vin. Abr. 612; Judgment, T. pl. 2; Id. 607; Judgment, P. pl. 1, 2; 20 Id. 540; Trespass, R. 11; *Broom v. Wooton*, Yelv. 67; S. C. Cro. Jac. 73; *Coke v. Jenner*, Hob. 66; Cro. Car. 75; *Claxton v. Smith*, 3 Mod. 86; 2 Show. 484; Bull.

N. P. C. 49; *Sparry's case*, 5 Co. 61; *Ferrer's case*, 6 Co. 7; Cro. Eliz. 667; *Feller v. Beale*, 1 Salk. 11; *Fields v. Law*, 2 Root, 320; *Livingston v. Bishop*, 1 Johns. 290 [3 Am. Dec. 330]; *Knox v. Work*, 1 Browne, 101.

J. Randall, contra. That the recovery of a judgment in trespass is a bar to any subsequent action, even without execution, is fully established: *Broome v. Wooton*, Cro. Jac. 73; Yelv. 67; Bull. N. P. 20; *Rawlinson v. Oriell*, Carth. 96; *Sparry's case*, 5 Co. 61; *Ferrer's case*, 6 Id. 7; *Ammonett v. Harris*, 1 Hen. & M. 488, 498; *Ewing v. Foul*, 1 Marsh. 457.

By Court, GIBSON, C. J. A plaintiff is not compelled to elect between actions that are consistent with each other. Separate actions against a number who are severally liable for the same thing, or against the same defendant on distinct securities for the same debt or duty, are consistent, being concurrent remedies. Trespass is, in its nature, joint and several; and in separate actions against joint-trespassers, being consistent with each other, nothing but actual satisfaction by one will discharge the rest. So far the law is clear. Here, then, the plaintiff had impleaded six jointly, and obtained judgment, but without actual satisfaction against two; and he now brings *indebitatus assumpsit* against a seventh for the price obtained for the goods, which were the subject of the trespass. The point of defense mainly relied on is that the plaintiff's property in the goods was divested by the former recovery; and consequently that he can not maintain an action founded exclusively on property in the goods, or the price of them. It is not easy to see how this is to be answered. It will not do to say that the present, though differing in form, is, in substance, an action to recover satisfaction for a trespass, and consequently that the form is immaterial. There is, in fact, a substantial difference. The cause of action in trespass and in *assumpsit* is as distinct in substance as the actions are different in form. Trespass lies only for an injury to the possession; and damages are recoverable for the taking, which is the gist of the action, separately from the value of the goods, the asportation being a circumstance merely of aggravation. *Assumpsit* lies for money received as the price of the goods, to the plaintiff's use, the detention of which is the gist of the action, the trespass being waived, and not entering at all into the estimate of the damages; it being well settled that nothing is recoverable beyond what was actually received. If there were no difference as to substance, and the form of the remedy were im-

material, a plaintiff might have several actions of assumpsit against those who had jointly sold his goods, on the ground of their having been obtained by a trespass, although the promise which the law implies from a joint receipt of the price, is also joint. He certainly might just as well proceed severally in assumpsit against all, as in trespass against some, and in assumpsit against the rest. But there is this further substantial difference, that the action in the one case is founded on a contract which survives, and in the other, on a tort, which, at the common law, does not. In fact, the attempt here is to make an administrator liable. A plaintiff must proceed consistently. He can not waive a part of the injury to give form to his action, and resume it to give substance. In waiving the trespass he dispenses with whatever could give character to the injury as such, and treats as a substantive and distinct cause of action, what would, in an action of trespass proper, be merely a circumstance of aggravation. In an action of assumpsit, therefore, he can not claim the benefit of any of the incidents or attributes which appertain to an action of trespass. The consequence is, that the plaintiff here having recovered in trespass, can not again recover in an action which is not a concurrent remedy; a recovery in trespass producing the same bar that is produced by a recovery in trover, against a recovery in assumpsit of the price of the same goods.

Judgment affirmed.

Referring to the principle announced in this decision that the judgment passes the title in trespass *de bonis asportatis*, Judge Kennedy, in *Fox v. The Northern Liberties*, 3 W. & S. 107, says: "It must be admitted, however, that a diversity of opinion exists upon this subject; but the authority in this state, so far as we have any evidence of it, seems to be in favor of the principle that the judgment alone in such case transfers to the defendant the plaintiff's right to the property: *Floyd v. Browne*, 1 Rawle, 121; *Marsh v. Pier*, 4 Id. 286, and the authorities there cited." And in *Merrick's Estate*, 5 W. & S. 17, the question is said not to be an open one in Pennsylvania. "A judgment for the value of the chattel is placed on the same footing as an actual satisfaction, and consequently divests the plaintiff's title."

TITLE PASSING BY JUDGMENT.—See this subject considered in the note to *Woolley v. Carter*, 11 Am. Dec. 520, 523.

STREAPER v. FISHER.

[1 RAWLE, 155.]

PURCHASER OF GROUND RENT AT SHERIFF'S SALE can maintain covenant for the rent against the owner of the ground out of which it issues.

THE LEVY OF AN EXECUTION will generally control all subsequent proceed-

ings. Therefore, if the levy be upon a rent charge and the sheriff sell the lot on which it is charged, no objection at the proper time being made, the rent charge passes.

PENDENCY OF AN EJECTMENT FOR A LOT OF GROUND out of which a rent charge issues, brought by the executors of a testator, will not bar the recovery in an action of covenant for the rent, by the devisees.

WRIT of error. Action of covenant brought by the devisees of Miers Fisher, deceased, who sued as assignees of Charles Hurst to recover three years' arrears of ground rent reserved in a deed dated March 9, 1785, from Charles Hurst to Charles W. Peale, under whom Streaper derived title. A verdict was found for the plaintiffs by agreement, subject to the opinion of the court, upon the following facts: A judgment having been obtained against Hurst in 1787, at the suit of one Brownjohn, execution was levied on parts of Hurst's property, and for the residue unsatisfied, an *alias fieri facias* was levied on the rent charge issuing out of the Peale lot. Several writs of *venditioni exponas* were issued, and the sales set aside. At length, in 1799, a *pluries venditioni exponas* was issued, commanding the sheriff to sell the rent charge. The sheriff, in fact, sold the lot out of which the rent issued, to Miers Fisher and another, and gave them a deed therefor. That other conveyed to Fisher.

The interest of Peale came to Streaper by mesne conveyances; in each of which was reserved the ground rent to Hurst, his heirs and assigns. The rent was paid to Fisher, until 1819, when Streaper, being induced to doubt his, Fisher's, title, refused to make further payments. In 1823, Fisher's executors, under a power in the will, brought ejectment for the recovery of the lot, or the payment of the rent. And pending that action the present suit was instituted.

J. R. Hopkins and P. A. Browne, for the plaintiff in error. The sale to Fisher was illegal and void: 1. Because there was no levy on the property, and the sheriff can not sell what he has not levied upon; 2. Because no inquisition was held to learn whether the debt would be discharged by the rents, etc., in seven years; 3. Because the sheriff had no authority to sell what he did sell. The plaintiffs can not sue on the covenant in the deed, they not being parties to the instrument, nor assignees of a covenant running with the land.

Dwight, T. Sergeant, and Price, contra. A purchaser at a sheriff's sale is an assignee in law, and becomes party to the covenant, and a covenant to pay rent runs with the land: *Shep. Touch. c. 7, p. 572, 574; 5 Coke, 17; Appowel v. Monnoux,*

Moore, 97; *Hurst v. Lithgrov*, 2 Yeates, 25 [1 Am. Dec. 326]. The deed passed all the interest of Hurst, and entitles his assignees to recover the rent: *Shaupe v. Shaupe*, 12 Serg. & R. 12; 1 Cowen, 470; 14 Mass. 404; 4 Yeates, 111.

By Court, HUSTON, J. (After stating the facts.) Several objections taken to the plaintiffs' recovery were very properly passed over by their concluding counsel.

The statute 32 Hen. VIII. is reported by the judges to extend to this state, and, in fact, has been always in use here. Soon after its passage a construction was put on it which has not been varied. Collateral covenants, such as do not relate to or depend on the land demised, are not within it; but covenants which touch or relate to the land demised, run with the land, and bind the assignee, and the assignee of an assignee, the assignee of an executor, or heir or devisee, or whoever is terretenant of the land under the demise, whether coming in by assignment or act of law; and the lessor, and all claiming under or through him, are equally bound, and equally entitled with the lessee, and those claiming under or through him. He to whom a lease for years is sold, is within it: 5 Co. 162 (the whole of that case); Shep. Touch. c. 7, 176, 179. And the only difference in the liabilities of the original parties, and those coming after them, is, that covenant lies generally against the original party after his interest is parted with; assignees are generally answerable for breaches within their own time, and when the books say no stranger can take advantage of a covenant, if by covenant is meant a covenant real, respecting land, or leases, it is to be understood that whoever is privy in contract or in tenure, is not a stranger. A stranger is one who claims under another title, adverse or paramount.

Another objection is made on account of the difference between the levy and the deed. This difference is as to the interest of C. Hurst in the lot, not as to the description of the lot, in which that interest is. The lot is well described, but the levy is on a rent charge, though the deed conveys the land itself, or purports to convey it.

What passes by a deed from the grantor to a grantee has been often discussed, and it would seem, ought to be considered settled. Courts will not, if it can be avoided, suffer a deed to be inoperative, when fairly made, and on good and legal consideration; and if the form used will not operate as the parties intended, it shall have effect in some other way, if possible. Thus, a deed intended as a release may take effect

as a grant of a reversion, an attornment, or a surrender *et converso*: Shepherd's Chap. of Exposition of Deeds; and 2 Saund. 94. Indeed, it has been very properly conceded that if Charles Hurst, after selling to Peale, reserving this rent charge, and a right of entry to enforce it, had afterwards sold a second time, all that Hurst could sell, viz., the rent charge and right of entry, would have passed. But it is contended that such is not the effect of a judicial sale on execution. A rent charge, or any other legal or equitable interest in lands, may in this state be sold on execution: 1 Yeates, 429; *Shaupe v. Shaupe*, 12 Serg. & R. 12. Generally, the levy will control all the subsequent proceedings; it is the foundation on which all is built. There may be difficulty where the sale is more extensive than the levy, if the objection is by the purchaser, and in proper time; for he may be affected. So there may be an objection by the defendant in the execution, if the advertisement does not conform to the levy; but if the plaintiff and defendant in the execution, and all judgment-creditors acquiesce, if the purchaser does not object, on what principle can a third person be heard at the end of thirty years, or why does he complain of an irregularity, which does not, and can not, affect him? The rent charge is due. The heirs of Hurst do not, and could not now claim it. But on principle and on authority the sale was good from the time the deed was made and accepted. Before or under some circumstances shortly after, the defendant or the purchaser might have objected. After payment of the money and acquiescence, neither could. Where the sale purports to convey the whole interest of the defendant in the execution, any and every interest he has will pass, at least where it is not greater than described; and even if greater, and the defendant knew of the sale, and did not take exception, and have his interest properly described. So in other states: 1 Conn. 470; 14 Mass. 404. The whole interest of Charles Hurst passed by this sale and deed, and the plaintiffs below are in law assignees of Charles Hurst, and can support this suit.

There is nothing in the objection of another suit pending. It is not by the same parties, nor, so far as we see, for the same object.

Judgment affirmed.

Followed on the following propositions, that all interests in land, legal or equitable, are in Pennsylvania subject to execution: *Rickert v. Madeira*, 1 Rawle, 329; *Sergeant v. Ford*, 2 W. & S. 127; *Rash's Estate*, 2 Parsons, 163. That the statute of *quia emptores* never was in force in that state: *Ingersoll*

v. *Sergeant*, 1 Whart. 351. That the interest which passes by the sale under an execution is to be governed by the extent of the levy: *Hoffman v. Dasser*, 14 Pa. St. 28. And that an assignee may sue in covenant in his own name: *Juvenal v. Patterson*, 10 Pa. St. 284.

ADLUM v. YARD.

[1 RAWLE, 163.]

THE ANSWERS OF A GARNISHEE on a foreign attachment, given in reply to interrogatories by the plaintiff, may, on a *scire facias* against the garnishee, be contradicted by showing that he swore differently on another occasion.

AN ASSIGNMENT MADE TO DELAY CREDITORS can not be questioned by one who took a dividend under it.

A PRESUMPTION THAT THE OBJECT OF AN ASSIGNMENT for the benefit of creditors has been accomplished or abandoned after the lapse of seventeen years, will not arise without corroborating circumstances.

ERROR in a *scire facias* against the defendant in error as garnishee in a foreign attachment. A writ of foreign attachment at the suit of John Adlum, the plaintiff in error, against Edward Stevens, was issued and served on James Yard, the defendant. After judgment was entered, a *scire facias* was issued against Yard, as garnishee, and several sets of interrogatories filed in succession, to all of which he gave answers upon oath. On the trial, these answers were read by the plaintiff's counsel, who then offered to contradict them by evidence of what the defendant testified to on a commission issued against him in bankruptcy in 1802. The evidence was rejected, and the defendant then gave in evidence a general assignment of all Stevens' effects to three trustees, for the benefit of his creditors, in trust to sell the same after the expiration of three years, if at that time the debts of Yard, for which Stevens was responsible, were not paid. The assignees paid dividends during 1804, and receipts of moneys thereunder given to Adlum were produced. The plaintiff's counsel contended that the assignment was void, or, if not so, that the length of time that had elapsed without anything having been done under it would justify the presumption that the objects of the trusts had been accomplished or abandoned.

The court charged the jury in favor of the defendant. Exceptions were taken to the rejection of the evidence and to the charge to the jury.

Chew and Rawle, for the plaintiff in error, urged that the evidence offered should have been admitted, and that the assignment was void. *Burd v. Fitzsimmons*, as explained by Chief Jus-

tice Tilghman in *Will v. Franklin*, 1 Binn. 515 [2 Am. Dec. 474]. Adlum's receipt of moneys did not bind him.

Binney and Chauncey, contra, contended that the evidence was properly rejected, and that the assignment, if voidable, was good as against Adlum, he having assented to it and adopted it: *Anderson v. Roberts*, 18 Johns. 525, 526 [9 Am. Dec. 235]; *Thomson v. Dougherty*, 12 Serg. & R. 459.

By Court, GIBSON, C. J. Under the act of 1705, the case of the garnishee was exactly that of any other defendant, the burden of proof resting exclusively on the plaintiff. But under the act of 1789, his position is entirely changed, being held liable in the first instance, and till he purge himself on oath. His situation, therefore, is not that of a witness or a respondent in equity, nor is his answer, when used against him, to be used as evidence originally adduced by the plaintiff. Like a deposition which has passed publication in chancery, it is in evidence before the hearing, but in evidence on the part of the garnishee, who could not else sustain himself long enough even to get before a jury. The plaintiff may, therefore, use it or not, at discretion, just as a party may use answers extorted by a cross-examination; and he is, consequently, not bound, as in the case of a bill of discovery, to take the answer as true, but may discredit it in the same way that he might discredit the evidence of a witness on the adverse part. Where the garnishee neglects or refuses to make "full, direct, and true" answers, the matter charged is to be taken *pro confesso*, and judgment rendered against him; so that the governing principle of the act is to hold him chargeable till he discharge himself, at least by his own oath; and failing to do so, he is to remain fixed. This is expressly his condition before answer put in. But where the answer is *prima facie* sufficient, its truth may be inquired of by a jury; and the plaintiff makes out his case merely by destroying the effect of the answer, unless the garnishee has maintained the issue by other satisfactory evidence, and this the plaintiff may do by disproving the matter alleged in the answer, or by showing the garnishee to be entirely unworthy of credit. In doing this, he restores the responsibility of the garnishee to the footing on which it was before the exhibition of the answer. On this principle, evidence which falsifies any fact asserted in the answer, goes to the credibility of the garnishee, and is, therefore, competent.

This construction may seem severe, but it is entirely in accordance with the spirit of the act; and it is not more so than

policy has been proved by experience to require. All necessary facts and circumstances are, for the most part, exclusively in the knowledge of the garnishee, and without holding him to a strict account, the remedy by foreign attachment would seldom be effectual. It is not to be understood from this that every step is necessarily fatal, or that a plaintiff entitles himself to a verdict where the jury are satisfied, from the whole evidence, that the garnishee has in truth no effects of the original debtor. But where the cause goes to the jury with no evidence on the part of the garnishee but his own answer, and that is discredited entirely, or as regards the facts which constitute his title to a verdict, the jury are bound to find against him. How does this bear on the question of evidence? In his answer to the second set of interrogatories, the garnishee had stated that Doctor Stevens was not originally interested in the cargoes of the Asia and the Dolly, and that no specific payment on account of his interest was ever made by him; but that he became chargeable by the respondent in a heavy account pending between them; and that the advances made by the respondent would alone have absorbed to within a trifle the amount which Doctor Stevens could have claimed. At the trial, the plaintiff offered the final examination of the garnishee before the commissioners of bankruptcy, "in order to prove that the same James Yard, the garnishee, was not entitled to claim certain credits stated to be due to him for advances made by him before his bankruptcy for the said Edward Stevens." It is obvious, on the principle I have indicated, that the evidence thus offered was competent to contradict a fact distinctly asserted by the garnishee. The exception to the charge is not sustained. The clause in the assignment by which the trustees were to be restrained from selling the land for a period of three years, was undoubtedly in delay of creditors, and brought the whole within the purview of the 13 Eliz. The plaintiff might originally have repudiated this assignment, but having taken a dividend under it, he shall not now question its validity. It has been pressed on us that a contract forbidden by a statute is incapable of confirmation, except on terms which render it consistent with the statute, and for a new consideration. No one can doubt it. But surely the acceptance of a dividend under a deed of trust is a new and a perfect consideration. Any one may waive the advantage of a law introduced for his own benefit; and I can not imagine why creditors may not ratify a contract fraudulent only as to themselves, even in anticipation of a be-

eft. But where money is actually received, and on an implied condition that the receiver shall not question the title, every principle of natural justice requires that the condition should be performed.

The doctrine of election is more analogous to estoppel than confirmation; and an estoppel may arise as well from matter *in pais* as matter of record. Doctor Stevens might have excluded the plaintiff from the benefit of the trust altogether; and had he supposed the latter would not have agreed to every part of the arrangement, he would certainly have done it, so that the plaintiff, having accepted a dividend on the only terms on which it was offered, is as effectually concluded from claiming in repugnant rights as if he had asserted the validity of the deed of trust in a court of record. But it is supposed that the doctrine of election is inapplicable to creditors. There is no adjudication in support of this, but *Kidney v. Coussmaker*, 12 Ves. 154, which can not be cited here as an authority for anything whatsoever, and from which, in the broad terms in which the principle is predicated, I entirely dissent. That was a case of a devise of part of the estate to trustees for payment of debts; and it was held that the creditors having obtained from the trust fund satisfaction only in part, were not precluded from recourse to other parts of the estate, which passed by the same will. To this I entirely assent, because the creditors could not be viewed as legatees, and the setting apart of a portion of the estate for the sake of convenience indicated no intention that the creditors should not be paid in the event of its falling short. The law, therefore, would not imply a condition that the creditors should relinquish their rights on the rest of the estate. But the unqualified assertion of the master of the rolls that the doctrine of election is utterly inapplicable to creditors, seems to be received with many grains of allowance, even in England: 1 Hovenden's notes to Vesey, 172. In *Irwin v. Tab*,¹ decided at the last term for the western circuit, we applied it to creditors claiming different debts under the same mortgage. In the case at bar, the debtor might prescribe the terms; and the plaintiff having received his dividend on an inherent condition to permit the whole arrangement to take effect, it seems clear that subsequent to the period of acceptance, the debt attached as due to Dr. Stevens, was, to every intent, vested in his assignees. But it is supposed the court erred in charging that no presumption arose from lapse of time, that the objects of the trust had been accomplished or abandoned, in either of which

1. 17 Serg. & R. 419.

events the contingent resulting trust in favor of the debtor would have taken effect in possession. There was, it seems, however, a lapse of but seventeen years from a time when the business of the trust was in full activity; a period which, without corroborating circumstances, is too short to raise a legal presumption that the debts were paid, or that Mr. Yard's estate had, within the prescribed period, been found sufficient to discharge all his debts for which Doctor Stevens had become responsible. Besides, the delay is satisfactorily accounted for by the fact that the effects, on which the attachment is laid, were received but a short time before; and it does not appear whether there was, in the mean time, any other property in hand. In the absence, then, of all circumstances but such as tended to rebut the supposed presumption, the court did not err in charging that the lapse of time was insufficient to revest the property in the assignor.

The following opinion was delivered by Huston, J. It has been said that one or more questions arise in this case which are entirely new; have never been raised in any case, or decided by any court. Perhaps this is true. But it does not follow that these questions are all of them difficult.

The first act about attachments, passed in 1705, *Purd. Dig.* 37, 1 *Sm. Laws*, 45, contemplates a trial by jury throughout, and expressly mentions, in the fourth section: "If the plaintiff in the attachment obtain a verdict, judgment, and execution," etc. And, in the fifth section, expressly provides for a trial by jury, when the garnishee denies that he has goods, etc., and directs the course of the proceeding after the verdict. This act, however, made no provision for compelling the garnishee to disclose what goods, chattels, moneys, and credits of the defendant were in his custody and possession, or due and owing by him to the defendant. To obtain this disclosure, an act was passed the twenty-eighth of September, 1789: *Purd. Dig.* 38, 2 *Sm. Laws*, 502, called a supplement to the several laws about attachments; by the second section of which it is provided that the plaintiff, after having obtained judgment against the defendant, may prepare, in writing, and file in the court out of which the attachment issued, such interrogatories, upon which the said plaintiff is or shall be desirous to obtain and compel the answers of any and every garnishee, in whose hands the said writ or writs of attachment hath or have been or shall be respectively laid and served, touching the goods, chattels, moneys, effects, and credits of the said defendant or defendants, in his

or their possession, custody, and charge, or from him or them respectively due at the time of the service of the writ of attachment, or at any other time. Section third provides: "Each and every such garnishee or garnishees to whom a copy of such interrogatories shall be delivered, is and are required and enjoined to appear, etc., and exhibit, under oath or affirmation, full, direct, and true answers to all interrogatories by the said plaintiff prepared and filed; and, if any garnishee or garnishees shall neglect or refuse so to do, then and in such case it shall and may be lawful for the justices of the proper court, and they are hereby required to adjudge that such garnishee or garnishees, so neglecting or refusing as aforesaid, hath or have in his or their possession, custody, or charge, goods, chattels, moneys, and effects of the said defendant or defendants in such writ or writs of attachment respectively named, or is and are indebted to such defendant or defendants, to an amount and value sufficient to pay and satisfy the debt, claim, or demand of the said plaintiff, together with legal costs and charges of suit. And shall award execution against the persons or goods, etc., of the said garnishee or garnishees, and proceed in the same manner as if judgment had been obtained or pronounced in pursuance of the verdict of a jury or by virtue of the confession of the party." It is now contended the court, and the court alone, are to decide whether the answers are full, direct, and true; and more, that the court is to decide on the answers themselves, without any evidence whatever to contradict the answers.

It may be conceded that the court could decide, without going out of the questions and answers, whether the answer was direct; and in one sense of the word, whether the answer was full; but in another, and in such case more material sense of the word, the court could not decide. For example, to the question what goods and effects of the defendant the garnishee had in his hands, the garnishee might answer as to part of the goods, and say nothing as to other goods. It may be said this would come under the word true. Be it so; my construction of the phrase is, that each answer must be full, and direct, and true; exactly tantamount to an oath to a witness, "to testify the truth, the whole truth, and nothing but the truth." The witness whose testimony is not correct in all these particulars, is perjured, and may be indicted and punished, if the aberration from truth was intentional and material. So, perhaps, could the garnishee. This punishment, however, does produce

justice to the party whose cause is trying; and he is permitted, by other testimony, to explain or contradict any testimony which would destroy his cause of action or his defense. Admit, however, for a moment, that the court alone were to judge of and decide on these answers, how they could determine whether they were full and true, without hearing other testimony, is for those to explain who advocate this position. But it is, perhaps, only contended that the answers are conclusive as to their fullness and truth when the plaintiff reads them; and that when he has read them, he shall not be permitted to contradict or vary them in any particular.

I am of opinion that he may read them, and afterwards show that they are neither full nor true. As respects the plaintiff's demand against the defendant, in the attachment, let it be remembered that is already established, and a judgment entered. The *scire facias* and interrogatories are not to make out a case as between the plaintiff and defendant; but to enable the plaintiff to recover the amount of his judgment from goods, etc., of the defendant, alleged to be in the possession of the garnishee, and, further, the interrogatories are not, and need not be, resorted to where the garnishee has at all times disclosed what goods, credits, etc., of the debtor were in his hands. It is only where the garnishee denies that he has any goods, or the plaintiff supposes him to have more than he admits, that this proceeding is necessary. The first act is not repealed, and you may proceed under it, if it will answer the purpose. The matter then in dispute on this *scire facias*, and the interrogatories, is a matter between the plaintiff and the garnishee, and in which, but for this act of assembly, the plaintiff could not obtain the answer of the garnishee. It is not the case of a plaintiff calling a witness, and afterwards discrediting his testimony, which I shall leave as it is in the decisions of our own courts in the cases cited. It is much more analogous to a bill in chancery, and the answer of a trustee who is called upon to state on oath whether he has effects liable to pay, and in consequence is liable to pay, the debt of the plaintiff; in which case, if the cause is tried on bill and answer, the answer is taken to be true; that is, where it is, on the face of it, full and direct. But the plaintiff may deny the truth of it, and if its truth is put in issue, may disprove all or any part of it.

Now, in this case, an issue was regularly formed. I do not, however, admit that we are to go to the practice of courts of chancery for our direction as to the mode of proceeding under

our acts of assembly. It may be referred to, but it is not conclusive. This act of 1789 was intended to be carried into effect by a court of common law, and by the process of our common law court. A chancellor might commit for refusing to answer, or to give a full and direct answer, but he would not sell the goods of the party refusing, and collect the debt of the plaintiff.

I have shown the first act contemplated, nay, provided for a trial by jury, where the garnishee pleaded that he had no goods, etc., of the defendant. That act is not repealed by the supplement; it is left in full force, and an additional mode of obtaining information as to the debtor's effects is given to him. But even where the garnishee answers that he has no goods, etc., he is not done, he is not discharged, he must plead to the *scire facias*, and the plaintiff may take issue on his plea, and a trial be had. We have several acts of assembly, which, from the letter of them, would seem to give to the court alone the power of determining facts as well as law. For example, the twelfth and fifteenth sections of the act for opening, repairing, etc., roads, which gives to justices of the peace a power of proceeding against supervisors neglecting their duty, or against individuals obstructing a road, with the right of appeal in each case, to the court of quarter sessions, who shall take such order thereon as to them shall appear just and reasonable, and the same shall be conclusive. Under this act, so far as I know, the practice has been, where the fact of neglect of duty, or of obstructing the road is denied, not for the court to decide it, but a bill of indictment is sent up, and the facts decided by a jury; and I know of no other mode of proceeding in use. There are similar acts in more than one of civil cases, in all of which, so far as I know, where facts are contested, an issue is formed in the cause, or a feigned issue, to settle the facts.

If the defendant's construction is right, the act of 1789 would produce one of two effects: it would leave the plaintiff's rights and recovery perfectly at the mercy of the opposite party; for I have shown that the garnishee has, where the truth of his answer is contested, become the real party; or it would be of no advantage to the plaintiff at all. That the practice has been to go on to trial after the answers of the garnishee, and to prove, if it can be proved, that his answers are not full and true, seems to me to be fully proved by 2 Dall. 113, where the court establish a rule as to costs in such cases.

A garnishee may appear before the court and jury in situa-

tions very dissimilar. He may have no claim to any part of the funds, may be perfectly indifferent between the different claimants of the fund, or he may allege a right to retain a part or the whole of it on some contract or for some debt to himself.

A factor may retain for the balance due him, or a consignee may retain goods consigned to him, to pay a debt due to himself, or a debt due to himself from the consignee, though the goods were not consigned expressly for that purpose: 1 Dall. 3. But where a foreign attachment is laid on such goods, the garnishee must show that there is a debt due to him from the consignee by other evidence than his own oath. The act directs interrogatories as to goods, etc., in his hands and custody, or debts due from himself; and to such interrogatories he is compelled to answer. If he goes beyond this, and states any debt due to himself from the absent debtor, his oath is no evidence of such debt. If he goes still farther, and states particulars of how it became due, and when and to what precise amount, his answer in this particular is beyond the intention of the act; and, if such part of his answer could be separated from the rest, in my opinion it ought not to go to the jury at all. If it be so mingled and interwoven with the disclosure of what is in his hands as not to be separated, the jury ought to be told it is no evidence of the facts stated. It can, at best, be only considered as notice of what he intends to prove, and which ought to be disregarded unless proved; and as to all such parts of the answer as go to show a right of retainer by the garnishee, the plaintiff may disprove it by any legal evidence which he can adduce. It has been said that part of more than one of these answers was argument-matter stated hypothetically. If so, such part clearly was not evidence, and ought to have been rejected. But the plaintiff did not consider it so, nor did the court; nor do I think it was so intended by the garnishee. His counsel did not put it on that ground at the trial. The expressions, "The respondent has a just claim upon the said Edward Stevens for the balance of an account current settled in December, 1824, to the amount of four thousand six hundred and eleven dollars and three cents," in number six of the first interrogatories; and the expression that after Stevens became interested in the *Asia* and *Dolly*, "he became chargeable by the respondent in a very heavy account pending between him and the said Stevens," in the latter part of the first answer to the second set of interrogatories, are not, and were not, intended as arguments. The fact that he had a contract with Stevens,

under which he claimed half the money recovered, was no argument.

But there is another view of this matter: If the money received under the Florida treaty, above twelve thousand dollars, would be the right of Stevens as part owner, and above twenty-eight thousand would go to the assignees of James Yard, to be distributed among his creditors; that is, creditors before his bankruptcy, was Stevens one of such creditors, and to what amount? If he was, he is entitled to a dividend; and that dividend, for anything we see in this cause, is as much in the hands and possession of James Yard, and as much liable to this attachment, as the part allotted to Edward Stevens, by name. I say, for anything we see. I understand the whole of this money to have been in the hands of James Yard when the attachment was laid. Whether this dividend, if there is any due, can be recovered from the garnishee in this proceeding, or must be sought for from the assignees of James Yard, or is due to the assignees of Stevens, or whether Stevens has any assignees, must depend on matters not known to this court, and I give no opinion about them.

It will appear from what has been said, that, in my opinion, the plaintiff ought to have been permitted to prove more in the hands of the garnishee than was admitted, if he could so prove; that, as to any claim of the garnishee to the property or money in his hands, he was bound to prove his right to it by other testimony than his own oath; and that the plaintiff had a right to rebut that proof or any statement on that subject by the garnishee himself, by any legal proof admissible in any other cause between contending parties; for, I repeat, that where the garnishee admits the receipt of goods or money, but sets up a right to retain it, the suit is from thenceforth one between the plaintiff and garnishee, in substance and almost in form.

The act of 1789, contemplates a judgment against the garnishee, if he refuses to answer, or his answers, as to what is in his hands, are not full, direct and true; and I have said, whether they are so, may, and often must, be decided by a jury. Whether the jury ought or can give a verdict against him for the whole of the plaintiff's demand, if they find that his answers are not full, direct, and true, has not been discussed, and I do not wish to give a binding opinion on this. I should suppose there were cases in which they might and ought to do so, but that this would only be where they found a plain intention to conceal or mislead, as to the amount in the hands of the garnishee; but by no means on account of the garnishee failing to support his own

claim of retaining for himself. It is for concealing the goods in his possession that this penalty is inflicted, not for setting up an unsupported claim to those goods.

Another and most important question arises in another part of this cause. The deed of assignment by Stevens has some unusual clauses; no sales are to be made of the real estate for three years from the date of the instrument. It also appears by this instrument and the indorsement, that Stevens was liable for above ninety thousand dollars on James Yard's account; and it provides that if James Yard or his assigns paid or discharged this debt within three years, the assignment was not to have effect; but Stevens' estate was to be restored to him in the same manner he held it before the assignment.

As I understand the law, either, and *a fortiori* both these clauses render this deed, in the words of the law, utterly void, frustrate, and of no effect. If this is not to delay and hinder creditors, to drive them to compromises, to releases, to defeat their claims and prostrate their rights, I do not see what would have those effects. Assignments by debtors have been supported in this state under circumstances, and containing clauses which would avoid them in any other country governed by the same laws, and, as I believe, clearly against both the letter and spirit of the law. An unwillingness to disturb and unsettle many assignments, made and acted upon before any of those cases were brought before the court, led to those decisions. The decided cases have given a sanction as far as they have gone. I do not agree to go one jot further. If assignments have been made not sanctioned by decision, I do not agree to give them my sanction, for we must stop somewhere; we must, at some point and at some time, say, no matter how many have violated the law, or how long it has been acquiesced in; the law has said the deed is utterly void, and we must say so also; and if a debtor can assign his property, keep his creditors from touching it for three years, he may for thirty, there is, in fact, little difference; the creditor, in most instances, will be ruined or prevented in some way from getting his debt as effectually in the one case as in the other.

But it has been argued that this deed has been confirmed, or rather rendered valid by some acts of the plaintiff in this cause, at least valid as to him; and a case has been cited where a deed of a married woman, which was void, had been rendered valid by a delivery after she became sole. It would be more correct to say that a new deed, after she became sole, conveyed the

land. A deed takes effect from the delivery; before the second delivery it was no deed; after the second delivery it was a deed from that time. If there is any case where a deed made void by a positive law has ever been held valid, it has not been cited, and among the many decisions on the law in question, I can find no dictum that such a deed can ever become valid. Who can give it validity? All the creditors, it is said, may agree beforehand to such a deed. Be it so; but then the case of a contract with creditors is presented, and not a deed to delay and defraud; then it would be a stay of execution by creditors, not one imposed on them.

But they may agree afterwards. They may, I admit, agree not to object to it; but they must all agree. If one does not, he may treat the deed as void and take the property. In such a case what is to become of those who had agreed or were willing to agree? They get nothing. But did they agree to this? You must let the court see their agreement before the extent and effect of it can be decided on. If the agreement is written, the court decide on it; if by parol, a jury must decide whether such agreement was made, and what it was, before a court can say what the effect of it is.

But it is said the plaintiff who has received money, a part of his debt, can not now say the deed is void, and his receipts show that he received money from these assignees. A creditor to whom three thousand dollars is due, may be, and often is, glad to get a part of it from any source; he may be in want, at the door of a jail, or his family starving. (I do not speak of this case, for I do not know the facts.) He may be deceived, misinformed; he may not have seen the deed; is his receipt of money in all cases, under all circumstances, to bind him? If not, and there may be any case in which he would not be bound, the court were wrong in taking this matter from the jury. But it is said a man can not affirm and disaffirm the same thing. I admit he can not do so at the same time; but he may at one time, under a mistake, treat a deed or will as valid, and not be bound to admit it to be so at all times and with other information.

A man who accepts a small legacy, much less than what would be his distributive share of an estate, and does so because he has been told there is a will, is not precluded from claiming more when he finds there was no will, or that it was void, because the testator was insane when it was made, or an infant, or that it was inoperative, because only one witness could

be found who could prove it. A person can not hold what he has got under a deed or will, and which he would not have gotten but for such deed or will, and still recover what he would be entitled to, independent of such instrument. But on accounting for what he has received under a mistake, and admitting it to have been received under a mistake, he may get what by law he is entitled to in addition. This generally; length of time or other circumstances may form exceptions.

If a creditor, under a mistake, or from misrepresentation, has signed a release, he may be relieved from it. I do not see, then, how he can be absolutely precluded by an act *in pais*, the most equivocal of all possible ratifications. And I do not agree that creditors, who have a right independent of the deed or will, are put to their election. They may take what is devised or conveyed for payment of debts, and, if not satisfied, resort to other property for the balance. To them the doctrine of election does not apply, as it does to volunteers, or persons who but for the instrument would have no claim.

I would say, then, that this deed was totally void and not validated by any act done, taking it in the strongest sense against the plaintiff; but, if it could be validated, that the act of receiving part of his debt was not such an act—at least, that being a matter *in pais*, it must be left to a jury and not decided at once by the court.

- I think, also, the question whether the sums for which Dr. Stevens was responsible for James Yard were discharged, was open to investigation, if the deed was ever good; and that it was proper to inquire whether the supposed assignees of Stevens ever acted; and, if they did, when they ceased to act; and how far they have abandoned the trust, and the trust property might be material in this case. I know nothing of the circumstances of this case; but I conceive it possible that a case may exist where the assignees have totally abandoned the property, or never intermeddled with it; in which case it would be great injustice to interpose their names, and use their neglected or abandoned title to defeat a creditor pursuing his right according to law.

It is not enough that a man has executed a deed of trust without consideration, and has acted as if it was accepted by them in some particulars, or has done some acts in their names, or procured some one to do so. Where a trust has really been created for a good and lawful purpose, chancery will not suffer it to fail for want of a trustee; but I suspect we have

many trusts of a kind unknown to any chancellor, and this court has decided that a conveyance to trustees for payment of debts of personal property, of which no possession was delivered, and where the debtor went on to act for many months as before the conveyance, was totally void, and the goods were as subject to the execution of a creditor as before the conveyance. I would then permit an inquiry whether such acts have been done as prove whether there was an acceptance of the trust; and that it is, or is not, and has not been treated both by Dr. Stevens and the assignees as at an end, and how long; for where there is no court of chancery to compel a discovery or a reconveyance, we must attain the object in some other way, and not lock up an estate forever by a conveyance not operative. All this, however, would not be necessary, if, as I hold, the conveyance was void in its creation.

Tod, J., concurred with Huston, J., except as to the deed not being rendered valid by the subsequent acts of the creditors.

Smith, J., was absent.

Judgment reversed, and a *venire facias de novo* awarded.

Cited in support of the principles, that a deed executed under circumstances of actual fraud can not be confirmed: *Chess v. Chess*, 1 Pen. & W. 42; that a conveyance in trust for creditors, but not to sell the property for three, is fraudulent: *Johnston's Heirs v. Harvey*, 2 Id. 92; *Kepner v. Burkhart*, 5 Pa. St. 490; that a reservation in favor of the assignor's family avoids an assignment for the benefit of creditors: *McClurg v. Lecky*, 3 Pen. & W. 91; that a creditor who takes a dividend under an assignment calculated to hinder creditors, can not question its validity: *Reinhard v. Keenbartz*, 6 Watts. 95; *Stroble v. Smith*, 8 Id. 281; *Wilson v. Bigger*, 7 W. & S. 125; *Hamilton v. Hamilton*, 4 Pa. St. 195; *Crowell v. McConkey*, 5 Id. 176; *Hays v. Heidelberg*, 9 Id. 207; *Beeson v. Beeson*, Id. 299; *Sailor v. Hertzogg*, 10 Id. 314; *Wilkinson v. Anderson*, 11 Id. 408; *Warden v. Eichbaum*, 14 Id. 126; *Smith v. Warden*, 19 Id. 430; *Burk's Estate*, 1 Par. 474; *Trustees of the U. S. Bank*, 2 Id. 147; *Spragg v. Shriver*, 25 Pa. St. 287; *Ingram v. Hartz*, 48 Id. 381; *Maple v. Kussart*, 53 Id. 352; *Williard v. Williard*, 56 Id. 128; that a stipulation for a release in an assignment which does not transfer all the assignor's property, avoids the assignment: *Hennessey v. Western Bank*, 6 W. & S. 311; *In re Wilson*, 4 Pa. St. 449; and that the answers of the garnishee are not conclusive where there is evidence to contradict them: *Mellree v. Guy*, 1 Phila. 491.

A CREDITOR CAN NOT ATTACK A CONVEYANCE AS FRAUDULENT, where he consents to its terms; Bump on Fraud. Cow. p. 457, *et seq.*; Burrill on Assignments, sec. 503. The principle has often been applied to assignment for the benefit of the assignor's creditors, where a creditor, notwithstanding he has received a dividend under the assignment, endeavors to impeach it on the ground of fraud. The opinion of Chief Justice Gibson, above given, on this proposition, is referred to in many instances in later Pennsylvania decisions

In *Hays v. Heidelberg*, 9 Pa. St. 207, the reasons on which the principal case rests are thus explained: "In *Adlum v. Yard*, the accepting creditor had no claim on the assigned fund, except through the medium of the deed of trust. By the acceptance of a dividend under it he derived a benefit which, without its existence, he would not have enjoyed; and this was said to be a new and perfect consideration sufficient to support a contract of ratification of a deed, otherwise fraudulent." And also in *Ingram v. Hart*, 48 Pa. St. 380, 381, the cases, holding that the receipt of a dividend under an invalid assignment, or the proceeds of an invalid sale, will estop the creditor from denying the validity of the instrument or proceeding, are said to rest upon an implied condition of relinquishment or waiver. "To accept a benefit under something which may be contested, implies that the party accepting rests upon it, and agrees to abide by it, otherwise the payment would not be made to him. Hence, in such cases, an election is presented to him upon which he acts, and having, by this election, ratified the proceedings, he is estopped from denying its validity." Other instances of assignments, voidable in themselves, but affirmed by reason of the acceptance by the creditors of dividends under them, are *Burrows v. Alter*, 7 Mo. 424; *Rapalee v. Stewart*, 27 N. Y. 311; *Lanahan v. Latrobe*, 7 Md. 268; *Farmers' Bank v. Thomas*, 37 Id. 258; *Loney v. Bailey*, 45 Id. 450; *Lemay v. Bibeau*, 2 Minn. 291; *Scott v. Edes*, 3 Id. 388; *Richards v. White*, 7 Id. 349. And it is stated generally, in *Derry Bank v. Davis*, 44 N. H. 548: "That a creditor may bind himself by his assent to an assignment which is not within the provisions of the statute is unquestionable. The purpose of this law was to restrain the making of assignments which, though apparently general, did not, in truth, include all the debtor's property, and which also distributed it unequally among his creditors without their assent; but it was not designed to interfere with the right of the debtor and his creditors, by agreement fairly entered into to make application of the debtor's assets to the payment of his debts, in such a way as it should be deemed just by them, either by direct transfer of such assets to the creditors, in payment or part payment of their respective claims, or by assignment in trust, and with their assent to a third person for their benefit."

Other acts, than the taking of a dividend under the assignment, have been construed to be a ratification of the trust deed, and to estop the creditor from contesting its validity. As in *Rapalee v. Stewart*, 27 N. Y. 310, the contestant, a creditor, had entered into agreement with the assignees regarding the management of the assigned property, which agreement had been partly performed. Judge Marvin passing upon the objection that this creditor could not subsequently question the validity of the assignment: "The statute declares an assignment, made with intent to hinder, delay, or defraud creditors, void, as to the persons so hindered, delayed, or defrauded: 2 R. S. 137, sec. 1. Why is such an assignment void? It is because the effect of it is to delay or defeat creditors in the collection of their debts, and when made with such intent, it is void. But if the creditors consent to the assignment, how can it be said that they are defrauded? One can not predicate a fraud of facts having his assent upon a full knowledge of them. There can be no fraud, when all the parties interested are equally informed of all the facts, and mutually assent to them. It is true, in this case, the plaintiff was not consulted, at the time the assignment was made, but on being advised of its provisions he acquiesced in them, and entered into an agreement with other creditors, showing an assent to, and ratification of the assignment; by which agreement the parties to it consented and agreed that certain other persons, one of them being the assignor debtor, should be joined with the assignees, and should

convert and dispose of the property, and pay the creditors in the order of preference mentioned in the assignment. Here is not only a waiver of any right to attack the assignment for fraud, but a ratification of it by coming in and taking action, by agreement with other creditors, designed to prevent a sacrifice of the assigned property, by a disposal of it in the ordinary way by the assignees; and by the agreement authorizing further delays and compromises, etc. It would be a fraud upon all the other creditors to this agreement, if the plaintiff should be permitted to maintain this action, and by setting aside the assignment, gain a preference above them, and secure the payment of his entire debt. I think that the plaintiff was concluded, by his acts in reference to the assignment, from attacking it upon the ground of fraud as to creditors." The following decisions also furnish examples of the application of the same principles: *Hone v. Henriquez*, 13 Wend. 240; *Fiske v. Carr*, 20 Mc. 301; *Baker v. Lyman*, 53 Ga. 339; *Smith v. Espy*, 9 N. J. Eq. (1 Stock.) 160; *Bobb v. Woodward*, 50 Mo. 95.

In regard to the general question of fraudulent conveyances and the application of estoppel, it is said in *Lemay v. Bibeau*, 2 Minn. 291, 293: "There can be no doubt but that a conveyance of real estate in due form, even if made with the intent to defraud creditors, is good as between the parties and privies, and can only be avoided by a creditor of the fraudulent grantor: Rev. Stat. p. 269, sec. 1; 1 Smith's Lead. Cas. 41; *Jackson v. Malvin*, 16 Johns. 189; 1 Story Eq. Jur. sec. 425; *Jackson v. Caldwell*, 1 Cowen 622; 22 Pick. 253. And the creditor may have his election either to confirm the conveyance or attempt to avoid it, but he can not do both. He can not receive a benefit under the conveyance, and then turn round and claim that the conveyance is fraudulent and void. And it is held that by receiving a benefit under the conveyance claimed to be fraudulent, he thereby affirms it, so as to be estopped from setting up fraud or other facts in avoidance of it. He can not hold on to such part of the contract as may be desirable on his part and avoid the residue, but must rescind *in toto*, if at all, and the party who would disaffirm a fraudulent contract, must return whatever he has received upon it. Such, at least, is the rule with reference to the parties to a contract claimed to be fraudulent, and it is difficult to see how the creditor can stand in any better position in reference to the contract than an innocent vendee: *Mason v. Boret*, 1 Denio, 69; *Campbell v. Fleming*, 3 Nev. & Man. 834; Chit. on Con. 408, 409, 680; *Burton v. Stewart*, 3 Wend. 236; 2 Kent's Com., 480; 5 East, 449; *Voorhes v. Earl*, 2 Hill, 288; 3 Sand. 174; *Lemay v. Bibeau*, 2 Minn. 291, 293."

And, as a conclusion from a number of decisions referred to, Bump in *Fraudulent Conveyances*, p. 459, 2d ed., says: "If with notice of the fraud, either actual or constructive, he (the creditor) makes any agreement upon consideration confirming the transfer, or any statement or agreement to that effect, upon the faith of which the grantee acts as he would not otherwise do, or under such circumstances that his subsequent assertion of his rights as a creditor, if permitted, would operate as a fraud, he will be held to have confirmed the transfer." Citing *Jenness v. Berry*, 17 N. H. 549; *Lane v. Lutz*, 1 Keyes, 203; *Johns v. Bolton*, 12 Pa. St. 339; *Dingley v. Robinson*, 5 Me. 127; *Seymour v. Lewis*, 13 N. J. Eq. 439; *Tate v. Liggatt*, 2 Leigh, 84; *Okie v. Kelly*, 12 Penn. 323; *Irwin v. Longworth*, 20 Ohio, 581; *Renick v. Bank*, 8 Id. 529; *Myers v. Leinster*, 7 Ired. Eq. 146; *Bobb v. Woodward*, 50 Mo. 95.

The same principles are enforced in *Olliver v. King*, 8 De C., M. & G. 110. A father executed a voluntary deed, assigning a considerable portion of his property to sons, with the concurrence and advice of his brother

to whom he was largely indebted. He also made his will, appointing his sons and his brother executors and trustees. The brother acted under the will until his death, which took place seven years after that of the testator. He never took any steps to impeach the voluntary deed, but was a party with the donees under it to instruments and transactions proceeding on the assumption of its validity, and the court ruled that at his decease his representatives could not impeach the deed as being void against creditors under the 13 Eliz. c. 5. Lord Chief Justice Turner said: "The question to be considered is, not whether James (the father) had a right to make the settlement, but what is the effect of John's (the brother's and creditor's) concurrence in the settlement. Suppose John had executed the deed for the purpose of testifying his consent to the transfer of the leasehold property by that deed, could he then have impeached the deed? I apprehend that he clearly could not, and if he could not, there is nothing which he has done falling short of the execution of that deed, except that there is not his pen put to the paper by which the property was transferred. I think, therefore, that as he could not have impeached the deed if he had actually executed it, neither could he have impeached it under the circumstances of concurrence on his part, which are in evidence in this case. If he could not have impeached it, of course his executors can not. Even if he could have done so, I am not satisfied that his executors could. When he had lived for a period of seven years leaving this settlement unimpeached, I am not sure that he might not be taken to have elected to abide by it. I am not confident that the executors claiming under him could have instituted proceedings which he himself did not think proper to institute. I give no opinion, however, on that point, further than to say I am not satisfied upon it. My opinion is based upon this: I consider the true effect of this transaction to be, that John by his conduct agreed to this alienation of the assets, and must be considered to have consented to take satisfaction out of the property which remained." Lord Justice Knight Bruce pronounced an opinion to the same effect.

Whether the return of that which was received under an assignment will entitle the creditor to claim the assignment to be null and void, is a question suggested by *Lemay v. Bibeau*, 2 Minn. 291, as well as by *Scott v. Edes*, 3 Id. 388, but is not answered, although it was explicitly declared in the latter case that, because the benefit received had not been returned, the creditor could not impeach the assignment.

From all of these adjudications it appears, either by express language or by necessary implication, that the creditor should have knowledge of the fraudulent nature of the conveyance at the time he did those acts which are construed as a waiver of the fraud upon him. But this notice need not be actual notice of the fraud; it will be sufficient if it be constructive notice. This question was considered in the case of a fraudulent assignment in *Scott v. Edes*, 3 Minn. 388.

It appeared that under an assignment for the benefit of creditors, Scott received a dividend on his claim against the assigning debtor. Subsequent to this the assignment was pronounced invalid, because of a clause permitting the assignee to sell the assigned property on credit. Scott then commenced an attachment suit against the assignee to recover the amount of his debt, whereupon the assignee, Edes, began these proceedings to cancel the attachment of record. It was admitted that where a creditor received a benefit under an assignment, or becomes a party to it voluntarily, with a full knowledge of its provisions or circumstances rendering it fraudulent as to creditors, he is thereby estopped from afterwards impeaching it. But it was contended that since Scott was

ignorant of the fact that the trust deed contained a clause rendering it void, notwithstanding his confirmatory acts, he is not estopped from treating it as void as to creditors. Concerning this contention, Judge Atwater, speaking on behalf of the court, said: "We are well satisfied that the position of the counsel for the plaintiff can not have the broad application claimed for it. Mere ignorance of the existence of a certain fact will not of itself justify or relieve from the consequences of a course of action based upon the assumption of the non-existence of such fact. It is true that from the unguarded language of some of the authorities, it might be inferred that where the question of the knowledge of a particular fact affected the rights of a party, courts will inquire simply as to the naked fact of the existence of such knowledge in the party affected by it. A moment's reflection, however, will suffice to show that such a rule can not obtain, as it would produce the most pernicious consequences. If such a plea were to protect parties from the consequences of their conduct, they would always be voluntarily ignorant in regard to facts of which they had the amplest means of informing themselves, and are culpably negligent in failing to obtain information. Where the question above referred to is raised and becomes important, courts will carefully scrutinize the means of knowledge possessed by a party where he pleads ignorance, and consider whether he has been guilty of laches in neglecting to avail himself of information within his reach. If so, actual ignorance will not avail to protect him from the legitimate consequences of his own acts."

And it would seem to be in keeping with justice that one who seeks to change his position under a conveyance, whose validity he has recognized, thereby, in all probability, prejudicing the rights of other creditors, should show that he has acted in the highest good faith and with diligence in the matter.

LANCASTER v. DOLAN.

[1 RAWLE, 231.]

A MORTGAGE IS A PURCHASER within the intent of the statute: 27 Eliz. c. 4.

VOLUNTARY CONVEYANCES ARE NOT VOID against subsequent purchasers in Pennsylvania, by virtue of that statute.

A VOLUNTARY DEED DULY RECORDED, in the absence of actual fraud, is as valid against a subsequent purchaser as one given for a valuable consideration.

A FEME-COVERT, IN RESPECT TO HER SEPARATE ESTATE, is to be deemed a feme-sole only to the extent of the power clearly given by the instrument by which the estate is settled.

A MORTGAGE IS AN EXECUTION OF A POWER to appoint by any writing, in the nature of a will or other instrument, under hand and seal, executed in the presence of two credible witnesses.

EJECTMENT. The opinion states the case. Verdict for the plaintiff, subject to the opinion of the court.

Binney, for plaintiff. The settlement on Mrs. Berrien was voluntary and void against subsequent purchasers: *Gooche's case*, 8

Co. 60; *Culville v. Packer*, Cro. Jac. 158; *Prodgers v. Langham*, 1 Sid. 133; *White v. Hussey*, Prec. in Ch. 14; *Tonkins v. Ennes*, 1 Eq. Ab. 334; *White v. Sansom*, 3 Atk. 412; *Lord Tononsend v. Windham*, 2 Ves. 10; *Roe v. Millon*, 2 Wils. 356; *Goodright v. Moses*, 2 W. Bl. 1019; *Chapman v. Emery*, Cowp. 280; *Doe v. Martin*, 1 Bos. & P. 332; *Mercer v. Welsmore*, 8 T. R. 528; *Evelyn v. Templar*, 2 Bro. C. C. 149; *Roberts on Frauds*, 13, 17, 33, 37, 66, 73; *Ridgway's Lessee v. Underwood*, Whart. Dig. 291. A mortgagee is a purchaser: 1 Eq. Cas. Abr. 353; *Chapman v. Emery*, Cowp. 280; *Roscarrick v. Barton*, 2 Chan. Cas. 220; *Senhouse v. Earle*, Amb. 289; *Roberts on Frauds*, 373, 392; *Verplank v. Sterry*, 12 Johns. 536 [7 Am. Dec. 348].

J. R. Ingersoll, contra, urged: 1. The mortgage is ineffectual to bind any of the property contained in it. 2. If operative at all, it can only affect the life interest of Tony Rogers in one fourth of the premises, and can have no effect, either upon the one fourth which belongs to Mrs. Berrien, or on the remainder in the whole, which belongs to Mrs. Rogers' children. 3. In any event it can bind but one fourth of the estate, Mrs. Berrien being in full life.

By Court, GIBSON, C. J. Tacy Prior, being seised of a moiety of the premises, executed a conveyance to trustees, by which she limited a moiety of her moiety to her mother, Mary Berrien, for life, and the residue, together with the remainder, after the death of Mrs. Berrien, to her own separate use for life. The remainder in fee to such person as she, by any writing in the nature of a will or instrument under her hand and seal, and executed in the presence of two credible witnesses, should designate and appoint; in default of such appointment, to her issue, if more than one, equally in fee; in default of issue, to her brothers and sisters in fee; and in default of brothers or sisters, to her right heirs on the part of the mother, in fee. She married Mr. Rogers, and with him executed a mortgage to the plaintiff of the entire moiety; on which it was sold and purchased by him at sheriff's sale. The questions which arise are: 1. whether the conveyance is void by the statute, 27 Eliz., as regards the estate limited to Mrs. Berrien; 2. whether Mrs. Rogers could dispose of the estate, limited to her own separate use, without a power specially reserved; 3. whether the mortgage was an effectual execution of the power as regards this remainder.

It must be admitted, that a mortgagee is a purchaser within

the intent of the statute; *Chapman v. Emery*, Cowp. 278, is in point; and whatever may have been the character of the plaintiff originally, he has become a purchaser to every intent, by taking the thing pledged, in satisfaction of the debt. The question then comes to this: shall we follow the English judges in holding every voluntary conveyance void as to subsequent purchasers, or interpret the statute anew, in reference to the circumstances and condition of our own country? Had the English construction been established before the American Revolution, although it is by common consent agreed to be harsh and repugnant to natural justice, I would, in parity of circumstances, submit to it on the ground of authority. Whether it was so established has been discussed by Chancellor Kent, in *Sterry v. Arden*, 1 Johns. Ch. 266; and Mr. Justice Spencer, in *Verplank v. Sterry*, 12 Johns. 553 [7 Am. Dec. 348], where the cases are collected and so minutely examined as to leave no room for a review of them here. The conclusion of the chancellor is, that "the late cases have declared no new doctrine, and have only followed the rule as they found it long before settled by a series of judicial decisions of too much authority to be there shaken."

Mr. Justice Spencer, on the contrary, thinks that the authorities prior to the revolution "are, in weight and number, decisively adverse to the doctrine which now prevails in Westminster Hall." In this, the learned judge undoubtedly asks too much. But he might have conceded much without endangering the argument; for Lord Ellenborough, on whose opinion the chancellor particularly relies, goes no farther than to say that "the weight, number, and uniformity of the authorities (in favor of the modern doctrine) do very much preponderate." As to number and uniformity, those collected by him stand in the proportion of nine to eight, which certainly shows no great preponderance; and the four added by Chancellor Kent, are altogether insufficient to satisfy us that the question had been put at rest, even though some of the authorities on the other side may, as he alleges, have been but dicta. The whole mass evinces a restless and unsettled state of the professional mind both on the bench and at the bar; and although the weight of authority undoubtedly inclined in favor of the modern doctrine, it could with no propriety be considered as established at the declaration of our independence, the period material to the question of its recognition here.

Nothing but an uninterrupted series of authorities established

by common consent ought to sustain a principle on which no titles depend, and which, in its origin, is admitted on all sides to have been erroneous and unjust. The statute is undoubtedly in force here. It does not, however, in terms declare voluntary conveyances to be void, but only such as are made for the "intent and purpose to defraud and deceive such persons as shall afterwards purchase." The intent and purpose were consequently left to the judges, some of whom shortly afterwards began to consider every voluntary conveyance fraudulent, without regard to the truth of the case. In *Cadogan v. Kennel*, Cowp. 434, Lord Mansfield expressed an opinion that the common law, as it is now universally known and understood, would have attained every end proposed by the statutes of Elizabeth. It would have done so undoubtedly, but by a different process, it being a favorite maxim of the common law that fraud must be proved, and not presumed. It is evident that the judges were led to carry the construction beyond the maxim by motives of policy which, I submit, have no place here. Previous to the fourth year of Queen Anne there was no provision for registering conveyances in any part of England, and they are registered only in Yorkshire and Middlesex at this day. It is evident that where conveyances took effect according to priority of date, without regard to notice, gifts afforded extraordinary facilities to fraud in comparison with conveyances for a valuable consideration, the existence of which, in cases of controversy, could be shown as explicative of the transaction. It is, therefore, perhaps not strange that the judges cut the matter short by declaring all voluntary conveyances void, instead of embarrassing themselves with questions of notice, especially as the equity of the donee who paid nothing for the estate, might, under any circumstances, seem unequal to that of a purchaser who had paid a fair price. With us the case is entirely different. The act of 1775 requires all conveyances to be recorded in six months, and declares that "every such deed and conveyance which shall, at any time after the publication hereof, be made and executed, and which shall not be proved and recorded as aforesaid, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such deed shall be recorded as aforesaid, before the proving or recording of the conveyance under which such subsequent purchaser or mortgagee shall claim." This, it will be perceived, is predicated without distinction as to consideration; and it gives rise to an irresistible implication in favor of the converse of the proposition, that every conveyance, with-

out exception, which is thus recorded, is effectual against subsequent purchasers and mortgagees. It seems to me the question might be safely rested here. To say the least, it is expressly established that conveyances shall take effect, not according to priority of date, but of record notice. Title is made a matter of record, and negligence is justly imputable to every one who purchases without having searched the proper offices. Such a purchaser can pretend to no equity against one who has done what the law requires to put him on his guard. It is admitted that a voluntary conveyance is good between the parties, and it is a common principle of equity that an assignee, with notice, must abide by the case of the assignor.

But the pretended equity of a subsequent purchaser with notice, even as against a volunteer, would spring from an act, the consequence and design of which would be to enable the donor to cheat the donee. The purchase would be an act of collusion, and all the fraud would be on the side of the purchaser. The palpable injustice of this has drawn from the English judges an expression of regret that voluntary conveyances had not been sustained against purchasers with actual notice. With them a distinction between actual and constructive notice might be proper; with us, where it is the fault of the purchaser himself, if he have not actual notice, there is not, and there ought not to be, a difference. Such a purchaser is justly chargeable with positive negligence, and would be chargeable with positive fraud were the consequences to fall on any one but himself. An unregistered conveyance is to be postponed without regard to its consideration, no distinction being made by the terms of the act; and there is no reason for postponing a registered voluntary conveyance, when untainted with actual fraud, that would not equally attach to a conveyance for valuable consideration. The injury to the donee would be as great, although, as he gave nothing for the estate, the hardship would be less. Still there would be a hardship, the difference even in this respect being only in the degree.

As therefore the matter in *res integra* here, we are at liberty to interpret the statute according to the dictates of justice and convenience; at all events, its construction must bend to the provisions of our own statutes, and we are consequently of opinion that the estate limited to Mrs. Berrien is unaffected by the subsequent mortgage.

In consequence of the death of Mrs. Rogers since the trial, the question which respects the estate limited to her separate

use, although exceedingly important in its principles, involves no more at present than the costs of the action. The conveyance is in trust "to permit her to use, improve, occupy, possess, and enjoy, and to receive all and singular the rents, issues, and profits." A use thus limited to any other than a married woman or *feme*, in contemplation of marriage, would be executed; but it is immaterial whether the trust be to pay a married woman the profits, or to permit her to receive them, it being necessary to a separate provision that the legal estate should remain in the trustees, to prevent the husband from taking the profits, and defeating the very object of the conveyance: 1 Saund. on Uses, 197. The estate of Mrs. Rogers, therefore, is a trust, and without any power of disposition being annexed to it in the deed. It has been pressed in the argument that such a power is an inseparable incident of the ownership. Nothing in the law is more to be deprecated than those decisions in which the right of a *cestui que trust* to dispose of his estate has been recognized. Every attempt to secure a provision to a spendthrift child must prove abortive, while the trustees are bound to follow any disposition of it which he may make. It is still more unfortunate that, as regards their separate estates, *femes-covert* have been regarded in equity as *femes-sole*. It has been justly remarked that if the principle be pushed to its extent, a married woman who has trustees will be infinitely worse protected than if she were left to her legal rights. There are instances of wives having been coaxed or bullied out of the protection provided, even at the instant when the settlement was before the court of chancery. Ought we then to follow this principle farther than our own decisions have carried it? The English decisions, since the declaration of our independence, have unsettled everything. In some it has been held that the *feme* may exercise absolute dominion, without an express power in the conveyance; in others, that she can exercise no power at all; and to this complexion they will perhaps come at last. But it is agreed on all hands that her power is not to be extended beyond her personal estate, and the profits of her land. She has not, in a single instance, been permitted to lay her hands on the inheritance.

There is, indeed, no case in which the question involved the exercise of a power over her own life-estate; but if her power does not comprehend the fee when she is the owner of it, it is not easy to understand how it can comprehend a less estate. It has been held to extend to copyhold, because the estate can

be surrendered only by her act; and as she is exclusively the tenant, and the husband's authority is suspended, it seems there is no objection to her act in the court of the manor. But there is no instance of her having been permitted to dispose of freehold, except in pursuance of the terms of the trust, or by way of power over a use. *Peacock v. Monk*, 2 Ves. 190, is express to the point. An agreement to dispose of the profits of her real estate has been executed in equity; but in a later case the court of chancery has refused to enforce a security on rents and profits under similar circumstances. Here, however, the mortgage was not of the profits, and it would be asking too much to require us to treat it as an agreement contrary to the meaning of the parties.

But it appears to me the trust in favor of Mrs. Rogers was intended to be unalienable. Although the distinctions on this head are justly obnoxious to the charge of subtilty, there is no doubt that the intention, where it is manifest, must prevail, although it be evinced by less than an express clause. Such an intention has been collected from very slight circumstances, such as a contingent interest in the wife after her husband's death; or a direction to pay the profits into the respective hands of the testator's sisters, as long as they shall live. Here the trust is expressed to be "for the personal support and comfort of the said Tacy;" a clause more clearly indicating an intent to prevent alienation by anticipation than any to be found in the cases in which the exception prevailed; and the estate of Mrs. Rogers would, therefore, be unaffected by a rigid application even of the English cases.

In fine, notwithstanding the case of *Newlin v. Newlin*, 1 Serg. & R. 275, which was hastily determined on an exception to evidence, we are entirely prepared to adopt the conclusions of Chancellor Kent, in *The Methodist Epis. Church v. Jaques*, 3 Johns. Ch. 108, that the English decisions are so floating and contradictory as to leave us at liberty to adopt the true principle of these settlements; that instead of holding the wife to be a *feme-sole* to all intents as regards her separate estate, she ought to be deemed so only to the extent of the power clearly given in the conveyance; and that instead of maintaining that she has an absolute right of disposition, unless she is expressly restrained, the converse of the proposition ought to be established, that she has no power but what is expressly given. We are of opinion, then, that the plaintiff did not acquire the estate conveyed to the separate use of Mrs. Rogers.

The remaining question depends on a few plain elementary principles. The use as to the remainder of the estate was executed by the statute; consequently the power of appointment reserved to Mrs. Rogers, being general, was intended to be exclusively for her benefit. In the words of Mr. Sugden, a general power of appointment is, in regard to the estates that may be created by force of it, tantamount to a limitation in fee, not merely because it enables the donee to limit a fee, which a particular power may also do, but because it enables him to give the fee to whomever he pleases. He has an absolute disposing power over the estate, and may bring it into the market whenever his necessities or wishes lead him to do so: Sugd. on Powers, 482, 485. But a power to sell implies a power to mortgage, a mortgage being a conditional sale: *Mills v. Banks*, 3 P. Wms. 9. And it would seem, for the same reason, that a power to charge will not imply a power to mortgage. Under a general power, it has been expressly held that a mortgage is a revocation: *Perkins v. Walker*, 1 Vern. 97; *Thorne v. Thorne*, Id. 141, and there is no reason why the donee may not appoint, by way of mortgage, as he may treat the estate in every respect as his own. Here the mortgage must be intended to have been in execution of the power, although it contains no reference to it, because, as the estate created by it can not be served out of Mrs. Rogers' interest, it must necessarily be served out of her power. It was, therefore, an effectual appointment.

SMITH, J., having been absent during the argument, in consequence of indisposition, took no part in the decision.

Judgment for the defendant, *non obstante veredicto*.

Followed as authority that a married woman holding a separate estate under a settlement is to be considered a *feme-sole* only to the extent of the power clearly given by the instrument, in *Estate of Mary M. Wagner*, Ash. 451; *Thomas v. Folwell*, 2 Whart. 15; *Dorrance v. Scott*, 3 Id. 316; *Hoover v. Samaritan Society*, that a mortgagee is a purchaser within the statute of 27 Eliz. ch. 4; *Mott v. Clark*, 9 Pa. St. 404; that the courts will so construe a grant or devise to trustees for the separate use of a *feme-covert*, so as to vest the legal estate in the trustees for the purpose of carrying into execution in the most effectual manner practicable, the intention of the donor: *Pullen v. Rianhard*, 1 Whart. 520. Upon the distinction between existing creditors and subsequent purchasers with respect to voluntary conveyances, the principal case is referred to in *Foster v. Walton*, 5 Watts, 379; *Speise v. McCoy*, 6 Watts & S. 487; 4 Whart. 452; *Gordon v. Preston*, 1 Watts, 386; *Wallace v. Coston*, 9 Id. 138; *Cochran v. O'Hern*, 4 Watts & S. 100; *Lyne's Exr. v. Crouse*, 1 Pa. St. 114; *Rogers v. Smith*, 4 Id. 98; *Barton's Estate*, 1 Par. 27; *Wetherill v. Mecke*, Bright. 140; *Wright v. Brown*, 44 Pa. St. 238; *Barnett's*

Appeal, 46 Id. 399; *Hinney v. Phillips*, 50 Id. 387; *McMullin v. Beatty*, 56 Id. 395; *Jones' Appeal*, 57 Id. 372, where the principal case is called the leading case in the state upon this question: *Shonk v. Brown*, 61 Id. 326; *Drusadow v. Wilde*, 63 Id. 172; *Wells v. McCall*, 64 Id. 212.

BANK OF PENNSYLVANIA v. WINGER.

[1 BAWLE, 295.]

MONEY IN THE SHERIFF'S HAND, under a sale of lands, sufficient to satisfy a judgment prior to that on which the lands were sold, is not *per se* a satisfaction of such prior judgment.

A PRIOR JUDGMENT-CREDITOR may waive his priority in favor of a subsequent judgment-creditor, without extinguishing his judgment. And if the subsequent judgment-creditor becomes the assignee of the prior judgment, he succeeds to all the rights of the assignor.

WRIT of error. *Scire facias* issued upon a judgment by the plaintiffs in error, the bank of Pennsylvania for the use of Echelman and Vernor against Winger and Reidebaugh. The case was: In April, 1822, Echelman recovered judgment against Reidebaugh for seven thousand eight hundred and fifty dollars, under which an execution was issued and levied upon real property of Reidebaugh. The property was sold June 28, 1823, for eight thousand five hundred and five dollars. The residue not needed for the satisfaction of the judgment, was paid over to earlier, smaller judgment-creditors. In January, 1822, Vernor obtained a judgment against Reidebaugh for two thousand six hundred and fifty-one dollars, and prior even to this judgment, in November, 1820, the bank of Pennsylvania recovered judgment against Winger and Reidebaugh. The latter had indorsed notes for the former, which had been discounted by the bank, and to indemnify against these indorsements, Winger had executed a bond to Reidebaugh on which judgment was entered in December, 1819, and satisfied February, 1820, by the assignees of Winger, who had made an assignment for the benefit of his creditors. In August, 1823, the bank assigned its judgment to Echelman and Vernor, who issued a *scire facias* to revive it, returnable the following November. Judgment having been obtained, a *fiery facias* issued in January, 1824, from the return of which it appeared that the debt, interest, and costs had been paid by the assignees of Jacob Winger, under his voluntary assignment. On the first of May, 1824, on motion of the counsel of Winger's assignees and affidavit filed, the court granted a rule to show cause why the money paid into the hands of the sheriff, on the execution in this case, should not be repaid to

the assignees, the execution set aside, the judgment opened, and the defendants let into a defense. The court decided that the defendants should be let into a defense; that the execution should remain as a security, and that the money paid under it should remain in court to abide the event of the suit. The cause was tried on the plea of payment in order to ascertain whether anything was due on the original judgment.

The counsel for the respective parties requested charges to the jury. The points for the plaintiff were, in substance, that the persons paying money to a sheriff on an execution can not recover the same again; that the assignees of Winger, the principal in the note on which the action was brought, having paid the judgment in good faith, they could not now demand a return of the money; that the money was paid with full knowledge of the circumstances, in satisfaction of an execution issued by a court of competent jurisdiction; that the plaintiffs were not bound to look to the property of Reidebaugh, which was taken and sold on execution, but that the principal having sufficient funds, they acted according to equity in seeking satisfaction from him; that if the indorser had been indemnified, and money placed in his hands by the assignees to satisfy this judgment, the plaintiffs were not bound to look to him alone, as that payment to Reidebaugh was in fraud of the creditors, and in the assignee's own wrong.

The defendants' points were: That the prior judgment in favor of the bank was extinguished by the levy of June 28, 1823, and that Echelman had knowledge of that levy. The court charged in favor of the defendants.

Evans and Norris, for the plaintiffs in error, cited: *Commonwealth v. Miller's Adm'rs*, 8 Serg. & R. 458; *Patterson v. Swan*, 9 Id. 16; *Barnet v. Washebaugh*, 16 Id. 414; *Morris v. Turin*, 1 Dall. 414 [1 Am. Dec. 233]; *Same v. Same*, 2 Id. 115.

W. Hopkins, for the defendants in error, cited: 2 Bac. Abr. 739; *Harris v. Fortune*, 1 Binn. 125; *Moliere's Lessee v. Noe*, 4 Dall. 450; *Hunt v. Breeding*, 12 Serg. & R. 41 [14 Am. Dec. 665]; *Cowden v. Brady*, 8 Id. 508; Whart. Dig. 90, pl. 4; *Lightly v. Brenner*, 14 Serg. & R. 132, 133; Gilb. Law of Executions, 25, 26; 2 Saund. 47, a, n. 1; 2 Bac. Abr. 720; *The Bank of N. A. v. Fitzsimmons*, 3 Binn. 358; *Auwerter v. Mathiot*, 9 Serg. & R. 403.

By Court, Gibson, C. J. It was long a moot point whether the sale of land on execution would discharge a prior lien; but I believe no one ever suspected that it would discharge the debt.

Such a consequence could be produced only by treating the debt and its lien as inseparable. The lien is, however, but a security, which may be released either before or after a sale, and as any other security, without affecting the existence of the debt. By a sale, the purchase-money is substituted for the land, and as it is withdrawn from the control of the debtor, and put within that of the lien-creditors, I admit that they are bound to look to the application of it, insomuch that a loss of any part of it will have to be borne by him whose act occasioned it; in other words, that the debtor may, in equity and conscience, consider whatever has perished in the hands of the sheriff as actually paid to him who is entitled to receive it. But can he do so in respect of what has gone into his own pocket, or, what is the same thing, in case of his debts? It never has been supposed—certainly, it never has been decided—that he can. Where a creditor has had two funds, we have prevented him from frustrating the lien of another who had but one; yet that could not be done if the rights of the parties were fixed by the sale; for the prior judgment-creditor would be paid by operation of law, and before the court could interpose. *Hunt v. Breeding*, 12 Serg. & R. 37 [14 Am. Dec. 665], is cited to show that a levy to the value of the debt, is *per se* satisfaction of the execution on which the levy was made. It would be more to the purpose to show that it discharges other executions which bind the goods. If such were the law, a multitude of cases would necessarily have arisen under it; and the total absence of decision on the subject is satisfactory evidence that the principle does not exist. Surely, a right to priority of payment may be waived without waiving that of which it is but an accident. A creditor may release the land without releasing the debt; and why not the purchase-money, which is in the place of the land? It seems to me he does no more when he waives his preference in favor of those who claim under the debtor by title subsequent. It is a principle of common sense which has been embodied as a maxim, that any one may waive a right created for his own benefit. What injury can it do any one? Surely Reidebaugh, whose proper debt was paid with his own money, could not object to the waiver of preference by the bank; and let us see whether Winger, his co-debtor, has any better right to do so.

Winger and Reidebaugh originally stood in the relation of principal and surety, so that the refusal of the bank to take satisfaction out of the land of the surety, was in furtherance of the equity between the debtors themselves; and to this Reidebaugh,

the surety, could not object. But, previous to this, Winger had put into his hands funds to discharge the whole debt, which Reidebaugh misapplied; and the original relation between them, therefore, was, in fact, reversed. But of this the bank was not apprised, and it was, therefore, justifiable in acting in conformity to the equity of the original relation. It waived its preference in favor of a surety to pursue the principal, the very thing that a court of equity would have compelled it to do. I will not stop to inquire whether relation of principal and surety is dissolved by a judgment at law, although the negative of the question is sustained by a solemn decision of this court, and there can be no reason why the fixing of the parties at law should absolve the principal from the moral obligation to protect his surety. For the purposes of the argument, I will admit that the relation is extinguished. The consequence is, that both are principals, and stand in equal equity as between themselves. How, then, could Winger object to the waiver of its preference by the bank, if Reidebaugh could not? A creditor may collect his debt from either of two principal debtors, or from both, at his election. If, then, the sale by the sheriff were not payment *per se*, the bank had nothing in its hands but the means of actual payment, which it is not bound to retain in favor of any one but a surety. This principle is well settled, both in Pennsylvania and England: *The Commonwealth v. Miller's Administrators*, 8 Serg. & R. 457; *Reed v. Garvin*, 12 Id. 103. The bank, then, might well permit the proceeds of Reidebaugh's land to go to his use without injury to Winger, who was in no respect entitled to be treated as a surety, and who had no other right to object than that of Reidebaugh himself.

Thus far I have considered the question as if it were between the defendants and the bank. The judgment is, however, owned, in part, by Echelman, the plaintiff in the judgment on which Reidebaugh's land was sold; and the question is whether he did not stand in at least as favorable a situation as did the bank. The case is just this: The bank had a judgment against two, which was bought in by a younger judgment-creditor, to enable him to give a preference to his judgment against one of them. I can see nothing wrong in that. An assignee for valuable consideration succeeds to all the rights of the assignor. Even an assignee, with notice, succeeds to the rights of a purchaser without it, because having paid for the advantage arising from the ignorance of the assignor, he is entitled to the benefit of it. If, then, the bank might have used its judgment so as

to favor Echelman, he acquired the same capacity, for when distinct rights concur in the same person, they are to be treated as if they existed separately in different persons. So far was it from being unconscionable in him to possess himself of the means and capacity of the bank, that a court of equity would have given him the benefit of them. "If," says Chancellor Kent, "a creditor has a lien on two parcels of land, and another creditor has a lien of a younger date on one of these parcels only, and the prior creditor elects to take his whole demand out of the land on which the junior creditor has a lien, the latter will be entitled either to have the prior creditors thrown upon the other fund, or to have the prior lien assigned to him, and to receive all the aid it can afford: *Cheesbrough v. Millard*, 1 Johns. Ch. 412 [7 Am. Dec. 494]. I cite this case because it contains a principle, in every particular, applicable to the case before us, and also references to the authorities. Echelman, therefore, could have compelled the bank to exhaust its means of obtaining satisfaction from the lands of Winger, or on payment of the debt, to assign its lien. It has voluntarily done the latter; and Echelman brings, in aid of the legal capacity of the bank, the equity of a junior judgment-creditor to have that capacity exerted for his advantage. It seems to me that independent of all other considerations, this is decisive in his favor. I am, therefore, of opinion that the judgment be reversed.

Judgment reversed.

Cited as authority that lien creditors are to look to the application of the fund at their peril, everything which a due attention to their interest would have entitled them to receive being considered as paid by operation of law, as regards the debtor, in *Finney v. Pennsylvania*, 1 Pen. & W. 241; *Konigsmaker v. Brown*, 14 Pa. St. 274; as authority that a purchaser at a judicial sale, fairly made, takes the land free from incumbrances created by the person as whose estate the land was sold: *Luce v. Snively*, 4 Watts, 398; *Presbyterian Corporation v. Wallace*, 3 Rawls, 138; *Kohl v. Harting*, 8 Watts, 331, application to a vendor's lien; that a surety may, in the course of events, become a principal: *Warren v. Sennett*, 4 Pa. St. 118; *Loan Co. v. Elliott's Executors*, 15 Pa. St. 228; that the release of an estate of the surety from the lien of a judgment will not discharge the estate of a principal, even in favor of creditors: *Mortland v. Himes*, 8 Pa. St. 268; and as recognizing the distinction between divesting a lien and discharging a debt in *Ramsey's Appeal*, 2 Watts, 232.

REITENBACH v. REITENBACH.

[1 RAWLE, 362.]

COMBINATION TO DEFRAUD CREDITORS.—Where creditors attack the validity of a judgment entered upon a bond given by a father in failing circumstances, to a son, soon after the latter's majority, on the alleged consideration of services rendered, the creditors may show that, on a sale of the father's goods by the sheriff, the son had claimed and retained several of the articles levied on.

WHERE THE FRAUDULENT COMBINATION IS PROVED, evidence of the declarations of the father, in his son's absence, that the bond was without consideration and to keep off creditors, is admissible.

WRIT of error to the common pleas. The case appears from the opinion.

J. Hopkins, for the plaintiff in error.

Norris, contra.

By Court, SMITH, J. This suit originated by the entry of a judgment by Daniel Reitenbach against Peter Reitenbach, on a warrant of attorney, on the seventh of October, 1822, in the court of common pleas of Lancaster county, to August term, 1822, No. 293. On the eighth of October, 1822, a *feri facias* issued. On the eighteenth of December, 1823, William Brinton, jun., a judgment creditor of Peter Reitenbach, on an affidavit filed, obtained a rule to show cause why the creditors of the said Peter Reitenbach, the defendant, should not be let into a defense, and why all the proceedings on the execution should not be stayed. This rule was made absolute, and the cause being put to issue, came on to be tried, when a verdict and judgment were rendered in favor of the plaintiff, Daniel Reitenbach. In the course of this trial, several bills of exception were taken, of which two only are offered to the attention of this court.

The paper book furnished by the plaintiff, Daniel Reitenbach, is very diffusive, and exhibits the cause in its whole progress upon the trial. As the two bills of exceptions neither embody nor refer to this mass of matter, it could not correctly enter into the discussion of the subjects contained in the bills of exceptions, nor into the deliberations of the court upon them. A bill of exceptions is given by the statute to bring matters of importance, which occur in the course of a trial, on the face of the record, which would otherwise not be found there, so as to secure a review of them by a superior court, if either party should find himself aggrieved by the decision of the inferior court upon

them. In its nature it, therefore, is not designed to draw into question all the occurrences of the trial, but that matter alone which it embraces, and which ought to be set forth with clearness and precision. The rejection or admission of evidence or testimony, or legal questions raised on facts admitted, are the appropriate objects of it; in the decision of which either party thinks himself injured. See 1 Bac. Abr. 528; 3 Johns. 558; 5 Id. 467, and 8 Id. 507. These two bills before the court exhibit all the testimony necessary to give a correct view of the offer, and found upon that testimony the right of the creditor to introduce other testimony which he offered to the court, and in which he was overruled.

This alone we have authority to examine, and, therefore, we can not do, as the counsel of the defendant in error pressed us to do, take an excursion with him through the whole of this voluminous book. Counsel would save themselves much labor, trouble, and expense, and greatly economize the time of this court, so precious to themselves and their clients, as well as to the court, if they would, in taking their bills of exceptions, exclude everything from them which is not essentially necessary to raise the question of law that is to be discussed and decided; and to present that in a clear and concise form. This observation is made from an ardent wish to correct a very vicious and unfortunate practice which prevails in taking bills of exceptions, by which matter altogether useless, and testimony entirely foreign to the point designed to be raised, is forced into them, to the great labor, expense, and trouble of the profession; to the great inconvenience and drudgery of the trying courts in settling the bills; and to the great annoyance of the supervising courts in searching through a paper book, swelled into a pamphlet, to find out the matter which they are to determine. A reformation in this respect would greatly save the time of the court for the use of suitors, benefit the profession, and relieve the court from a great deal of useless drudgery.

I will now approach the bills of exceptions themselves, and, from the first bill relied on, it appears that the creditor offered to prove that on the sale of Peter Reitenbach's property by the sheriff, Daniel Reitenbach claimed and retained a number of articles which had been levied on. This, on an objection by the plaintiff, the court overruled, and would not permit the creditors to give in evidence. Now, to me, it is exceedingly clear, this evidence should have been received; it was important, and had a direct bearing on the question before the court; and

that it had so, will, I think, be evident on an attentive consideration and examination of the whole matter. And, in order to arrive at a just conclusion, we must bear in mind that the bond in question was given by a father to a son, for services and work done, and this (in the language of the testimony) after the son had come of age. Those services continued for six months; the bond was for four hundred and sixty dollars—a large sum for work and services rendered in so short a period. Under these circumstances, then, the creditor alleged there was fraud in the transaction, and the bond given for an amount not due; and, to prove that this was so, he offered to show that the son had claimed, nay, retained a number of articles which had been levied on as the father's property; that, therefore, the son was paid for his services and could have had no demand against the father at the time the bond was given. If this was proved, it would be for the jury to say whether the amount of the bond was just, or how much was due, if anything. This evidence should have been permitted to go to them. But the court below refused the offer, and in the opinion of this court therein erred.

We are also of the opinion that the court erred when they refused to allow the testimony mentioned in the second bill of exceptions. On the trial the creditor had given strong evidence to show that Daniel Reitenbach and Peter Reitenbach had entered into a scheme to prevent others, the creditors of Peter Reitenbach, from collecting and obtaining their debts. The giving of this very bond was to be the means of carrying the project into effect; and it appeared that they had not only laid a plan to accomplish their object, but had gone on, and attempted to draw one Jacob Echelman into their scheme; in fact, disclosed in part to him how the creditors would be kept off. The creditor having thus established by proof a combination between the father and son to defraud and delay creditors, in order to show the same more completely, proposed to prove and give in evidence the declarations of Peter Reitenbach, made in the absence of Daniel Reitenbach, what he had said before the bond was given of their intention of giving the bond to Daniel Reitenbach to keep off the creditors, and that it was given without consideration, and for that purpose only. This, too, the court overruled. Now, I take the law to be, that the declarations of a party, made in regard to such an illegal act, after a combination to do the act has been established or proved, are not only evidence against the party making such declara-

tions, but are evidence also against all others of the combination, who are made equally responsible for the consequences. This is abundantly clear from the authorities cited by the respectable and learned counsel for the creditors, particularly from the case of *Patton v. Freeman et al.*, 1 Cox's N. J. Rep. 13,¹ in which it was decided that where a combination to perpetrate a fraud was proved, evidence of a conversation with the parties, though all might not have been present during the whole conversation, was good against all. So, also, in the case of *Bostwick v. Lewis*, 1 Day, 33 [2 Am. Dec. 73]. The declarations of Peter Reitenbach ought, therefore, to have been received by the court, and as that was not done, the judgment must, for this reason also, be reversed, and a *venire facias de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

1. *Patton v. Freeman*, 1 Cox, 112.

CASES
IN THE
CONSTITUTIONAL COURT
OF
SOUTH CAROLINA.

BARNES v. SHELTON.

[HARPER'S LAW REPORTS, 33.]

PAROL EVIDENCE IS ADMISSIBLE to show agreement that part of the property, for which a promissory note was given, might be returned if not approved of. Such evidence tends, not to vary the terms of the note, but to establish a right of set-off.

ASSUMPSIT on a promissory note given for two clocks. The defendant offered the evidence of one Taylor to prove that the agreement was that plaintiffs would take back one of the clocks, if defendant's father did not like it. Sims, the executor of defendant's father, testified that he had informed the plaintiffs that he should not consider the clock as part of the estate. The evidence was admitted against the objection of the plaintiffs. The judge charged the jury to find for the defendant, if they believed that there was a conditional contract. The jury found for the defendant, and the plaintiffs moved for a new trial.

By Court, **RICHARDSON, J.** The question in this case was not whether the terms of the note might be altered by parol evidence, but whether the defendant had not a good defense by way of discount against the note. The consideration of the note was a clock, with the right to return the clock, if disapproved of by the defendant's father. Accordingly, the clock being disapproved of, an offer was made to return it. Let us suppose for a moment that the defendant had paid for the clock, would he not have had a right of action for the price paid? Assuredly he would. "If the buyer," says Phillips, 2

vol. 79, "by the term of the contract, has power to rescind the contract by his own act, etc. (as where, together with the warranty, there is a power given to the buyer to return the horse within a certain time, and he accordingly offers to return it to the seller, who refuses to receive it), then the contract is determined by the single act of the buyer, and the buyer will be entitled to recover back the purchase-money, in action for money had and received:" Cowp. 818; 7 East, 274; 1 T. R. 133; Doug. 23. But the moment it appears that in such a case the purchaser would have had a right of action to recover back the purchase-money, it is equally evident that he has a good defense by way of set-off in a case where he has not paid the purchase-money. In a word, he who has a cross-action has the right of discount against an action brought. The error is in supposing that the evidence went to alter the terms of the note. But this is not its tendency; it was to set off against the note a return of the clock as authorized by the contract, which is equal to a total failure; precisely as if the clock, in the ordinary case of an implied warranty, had turned out wholly worthless. Although then parol evidence could not be adduced to alter the note, yet a good defense arose, by reason of the contract which authorized the defendant to return the clock, which return being made, the consideration of the note had gone back into the hands of the vendor, and the verdict followed for the defendant, upon an acknowledged principle, and in strict analogy to the common case of a total failure of consideration.

The motion is, therefore, refused.

GANTT, JOHNSON, NOTT, and COLCOCK, JJ., concurred.

KELLY v. REMBERT.

[HARPER'S LAW REPORTS, 65.]

JUSTICE OF THE PEACE WHO EXCEEDS HIS JURISDICTION, is liable to an action of trespass for improperly issuing an execution, and causing the property of a person to be seized and sold thereunder.

THE opinion states the case.

By Court, COLCOCK, J. This was a special action, brought against the defendant for causing plaintiff's horse to be seized and sold, under an execution issued by him for the costs of a mistrial, which happened in a case, under the acts of 1812 and 1817, for affording to landlords and lessors a summary mode of

regaining possession from tenants and lessees in certain cases. The last of these acts requires that two magistrates should sit in such cases, and the defendant alone, caused the jury to be impaneled and presided on the trial.

The jury could not agree on a verdict, and were discharged, and the defendant, for the costs of such mistrial, issued his execution, and caused the plaintiff's horse to be sold. The jury found a verdict for the plaintiff, and the defendant applies for a new trial, nonsuit, and in arrest of judgment. A number of grounds are stated, which it is not necessary, from the view which the court has taken of the case, to consider. The important questions are: 1. Whether an action can be maintained against a magistrate for such an injury; and, 2. Whether case is the proper action.

The counsel for the defendant, both in the court below and here, has taken the broad ground, that no one clothed with judicial power can be subjected to a civil suit; and has contended that the magistrate in this case was in the exercise of such powers, and must be considered as only having committed an error of judgment, for which he is not responsible in damages; and has referred to a number of authorities, which shall be examined in their order. It must be obvious that such protection is indispensably necessary for the due administration of justice, and the support of the law, in all the higher tribunals of justice, in which we have a right to expect a union of talent and integrity, to whom, therefore, such an indemnity may be with more propriety extended, and who are made responsible at the bar of the people. But it would be lamentable, indeed, if the inferior tribunals of justice were to be thus shielded. As much protection is, however, given to them as can be afforded, with a due regard to the rights of the citizen. Where they keep within their jurisdiction, and act from pure motives, they can not be made amenable to a suit for damages. It is scarcely possible to open a book on this subject, which will not show that magistrates may be made to respond in damages where they exceed their jurisdiction, when their acts are so palpably unjust as to be the result of sheer ignorance, a total disregard to the rights of their fellow-citizens, or corrupt motives. In looking into the subject, we are struck with the various statutes of Great Britain, made for their protection, such as limitations to the suits; provisions that they must be previously notified of the intention of the party intending to sue, and declaring that without such notice the party shall be nonsuited; that the suit

may be brought in the proper county; that they may tender amends, etc.: 2 Sel. 923-928.

The cases referred to by defendant's counsel were: First, the case of *Bentham*, 2 Bay, 1.¹ That was a case of commitment by the magistrate for a contempt, and it was clear he had such power and exercised it properly. The next was the case of *Yates v. Lansing*, 5 Johns. 282 [6 Am. Dec. 290], which can have no application, as it was the case of a judge of one of the superior courts, the chancellor of New York. But I shall hereafter refer to it, as supporting the general position as to magistrates. The third was the case of *Williams v. Spencer*, where it was decided that a constable, who broke into an inner room to arrest the plaintiff, was not answerable, having authority to do so: 5 Johns. 352. And the fourth, *Justice Burdine's case*, 2 Nott & McC. 168,² in which the general position which I have laid down is expressly recognized. Richardson, J., in delivering the opinion, says, they, the justices, are not liable, "unless willfully wrong or negligent, or at least convicted of such ignorance as shows a depravity in undertaking to give an opinion;" and in that case, the question determined was one of technical nicety, and on which the judges of the superior court differed.

In the case of *Yates and Lansing*, before referred to for another purpose, Chief Justice Kent, in stating the law on this subject, points to the distinction between inferior and superior tribunals: "Where courts of special and limited jurisdiction exceed their powers, the whole proceeding is *coram non iudice*, and all concerned in such void proceedings, are held liable in trespass." And he referred to the case of *Marshalea*, 10 Co. 68; and *Terry v. Huntingdon*, Hard. 480. In a subsequent part of the opinion, he repeats the same doctrine: "Inferior courts are only protected while acting within their jurisdiction;" and the reason is obvious, to such the extent of jurisdiction is marked out and defined. But I will not multiply arguments on a point so long and well settled by adjudged cases. By the statute of 18 Eliz., c. 3, s. 2, two magistrates are required to sit on the case of a woman's refusing to filiate her bastard child. In the case of *Weller v. Toke*, 9 East, 364, the defendant acted alone and committed the mother, and was sued in an action of trespass and false imprisonment, and a nonsuit was ordered on the ground above, of a want of notice of such intention to sue, as required by 24 Geo. II., c. 44, whereby he was prevented from tendering amends.

1. *Lining v. Bentham*, 2 Bay, 1.

2. *Reid v. Hood*, 2 Nott & McC. 168 [10 Am. Dec. 583.]

In the case before us, however, there can be no doubt, for the jury have determined that the defendant acted maliciously. They were instructed not to find vindictive damages beyond the real amount of what defendant had sustained, unless they concluded from the testimony that defendant had been influenced by malicious motives or acted corruptly, and they have found damages far beyond the amount of the injury sustained. But on the ground in arrest of judgment the defendant must succeed. Mr. Chitty puts this subject in a clear point of view; in treating of actions and laying down rules by which it shall be determined whether the action of trespass or case shall be brought, the first and most obvious one is, that where the injury is direct and immediate, the action must be trespass. It is in some cases, such as the collision of ships, difficult to decide when the act is to be considered as direct and immediate; but in a case like the present there is no difficulty, for the act is as direct as the case of the log being thrown against a person as contradistinguished from its being placed in the road and one falling over it. Trespass must be laid *vi et armis, et contra pacem*. But the force may be constructive. All illegal acts are, in the eye of the law, forcible and against the peace. Another important consideration is the subject on which the injury operates, whether the property, the person, or the reputation. In page 165, treating of the action of trespass, he says, in its application to personal property, it is to be considered with reference: 1. To the nature of the thing affected; 2. Plaintiff's right thereto; 3. The nature of the injury. As to the first, trespass lies for taking or injuring all domiciled and tame animals; 2. The property must be in the plaintiff's possession, either actual or constructive; 3. As to the nature of the injury, it may be either by an unlawful taking of the property or by injuring it while in the possession of the owner or bailee. Thus it appears that where the act complained of is unlawful, immediate, and operates on the personal property, trespass is the proper action. If further authority could be necessary, it will be found in an examination of the cases themselves, by which it will appear that trespass is the action used; and of the state, 43 Geo. III., c. 141, by which it is enacted that in certain cases therein enumerated, case only shall be brought: 2 Selwyn, 929.

JOHNSON, NOTT, and RICHARDSON, JJ., concurred.

It was held in *Flack v. Harrington*, 12 Am. Dec. 170, that a magistrate

was liable in trespass for issuing a warrant of arrest officiously, without a complaint on oath or personal knowledge that a crime had been committed. For an examination of the law relating to judicial liability, see note to *Yates v. Lansing*, 6 Am. Dec. 303.

NICKS v. MARTINDALE.

[HARPER'S LAW REPORTS, 135.]

STATUTE OF LIMITATIONS.—Where the statute had begun to run against an intestate in his life-time, its operation is not suspended until after administration granted, when the administrator could have taken out letters and sued earlier.

ACTION on an open account, the last item of which was dated in 1815. Pleas, the general issue and the statute of limitations, to the former of which the plaintiff joined issue, and to the latter replied that, although it was more than four years between the entry of the last item and the commencement of this suit, there was a period of twenty-three days from his intestate's death to the appointment of an administrator, during which time no suit could be commenced against the defendant; that from December, 1818, to February, 1820, the defendant himself was administrator of the personal estate of the intestate, left unadministered by the administratrix thereof, within which interval he could not, as administrator, bring suit against himself; and that said plaintiff, Nicks, had brought suit against the defendant Martindale within the four years, excluding the twenty-three days, and the further period during which the said Martindale was administrator.

The defendant demurred to this replication, and the judge sustained the demurrer, whereupon the plaintiff moved to reverse the decision.

Hayne and Grimke, for the motion. The representative of a deceased creditor is always allowed a reasonable time to bring suits: Tidd's Prac. 26, 27; Bull. N. P. 150; *Spencer's case*, 6 Co. 10. There ought to be no distinction between an estate plaintiff and an estate defendant. Where there is a disability to sue, the statute is suspended. The defendant, during his administration, could not sue himself, though he ought to have paid the debt. Where there is no administration granted the estate is not represented, and the inability to sue is absolute.

Dunkin, contra. When the statute once begins to run, it shall not be suspended by any supervening incapacity: *Adamson v. Smith*, 2 Mill, 269 [12 Am. Dec. 665]. In this case there

was no disability to sue, because administration might have been taken out, and a suit commenced in proper time.

By Court, COLCOCK, J. The general rule on this subject is, that when the statute begins to run it shall not be impeded in its operation by any disabilities. But to this rule there are exceptions, some of which are enumerated in the statute, and one or two which arise from a construction of the statute. There is certainly nothing in the act itself which will authorize the court in saying that its operation shall be suspended until administration granted; nor can this be brought within any reasonable or just construction of the act. Where, by positive enactment, one is prevented from suing or being sued, it is reasonable to say the operation of the statute shall be suspended; but where the fault lies with the party himself, whose rights are affected, this reason does not operate. This court has decided that the clause in the executor's act which says an action shall not be brought against the estate of a deceased person for nine months, is a suspension for that time of the statute; and so where, by the common law, an alien enemy is prevented from suing, the statute is suspended during the war; and so upon an equitable construction of the statute of James, it has been held, that an executor or administrator may be permitted to renew a suit within a year after the death of testator or intestate, who had sued in his life-time, even if the six years expire during that time; in all of which cases, it is clear the law only suspends the operation of the statute, where the party has been prevented from, or delayed in the prosecution of a suit. It was contended for the plaintiff that there is an analogy between the case of the plaintiff and those cases which arise under the statute of 4 Anne, c. 16, where a reasonable time is allowed to the plaintiff after the return of his debtor; but the analogy furnishes an argument against the plaintiff; for, in such cases, he is required to sue as soon as he learns that the debtor is returned, and here it is clear that the plaintiff might have proceeded earlier than he did. He might have administered sooner, and he failed to sue for nine months and more after administration granted to him. But to what consequences might this lead? Administration might not be taken out for years, and thus claims kept alive contrary to the very policy of the statute, until all evidence of payment be lost. I am not inclined to multiply the exceptions to the statute. I think it has been very properly called a statute of repose, and that it is a good shield against dishonest claims. If occasionally

a just debt is lost by its operation, it can only be by the inattention of those to whom it is due

The motion is dismissed.

NOTT, GANTT, JOHNSON, RICHARDSON, and HUGER, JJ., concurred.

When the statute of limitations has once begun to run, its operation is not suspended by any subsequent disability: *Ruff's Administrator v. Bull*, 16 Am. Dec. 290; *Adamson v. Smith*, 12 Id. 665; *Thompson v. Smith*, 10 Id. 453, and note, 457; *Faysoux v. Prather*, 9 Id. 691; *Demarest v. Wynkoop*, 8 Id. 467; *Jackson v. Moore*, 7 Id. 398; *Fitzhugh v. Anderson*, 3 Id. 625.

DRUMMOND v. HYAMS.

[HARPER'S LAW REPORTS, 268.]

ENTRIES IN A TRADESMAN'S BOOKS, TRANSFERRED FROM HIS SLATE, without showing who transferred them, or that they were transferred daily, are not admissible in evidence.

ACTION on an open account by a shoemaker for boots and shoes said to have been delivered to the defendants. The plaintiff produced his books, and the clerk who made the entries swore that they were copied from a slate kept in the store. On cross-examination, he admitted that the items were not always transferred to the books on the same day that they were made on the slate; that he could not say whether or not the items in question were transferred to the books on the day they were entered on the slate, and that he could not tell by whom the entries on the slate were made. The recorder nonsuited the plaintiffs, and a motion is now made to set aside the nonsuit.

By Court, HUGER, J. A shoemaker's books are not evidence at common law, nor are they made so by statute; the practice, however, of receiving them as such has too long prevailed in this state to be now disturbed, but it must be confined to the limits hitherto assigned it. The original entries must be produced. It is not enough to produce the copy of an original entry, made by we know not whom, to entitle the plaintiff to recover.

The motion is, therefore, refused.

BAY, NOTT, COLCOCK, and JOHNSON, JJ., concurred.

As to the admissibility of books of account and books of tradesmen in evidence, see *Kaughley v. Brewer*, 16 Am. Dec. 554; note to *Union Bank v. Knapp*, 15 Id. 191; *Nicholson v. Withers*, 13 Id. 739; *Ingraham v. Bockins*, 11 Id. 730, and note, 732; *Cogswell v. Dolliver*, 3 Id. 45.

PAGE v. LOUD.

[HARPER'S LAW REPORTS, 269.]

INSOLVENCY OF MAKER OF PROMISSORY NOTE DOES NOT EXCUSE WANT OF NOTICE of his default, where it is sought to charge the indorser.

ACTION by indorsee of a promissory note against the indorser. The defense was a want of notice of the maker's default. Plaintiff proved that the drawer was notoriously insolvent. The recorder nonsuited the plaintiff, on the ground that notice was necessary. A motion was made to reverse the decision, and for a new trial.

Gadsden, for the motion. A promissory note after indorsement is entirely analogous to a bill of exchange, and where the drawer had no funds in the hands of the drawee, that fact has always been held to dispense with the necessity of notice: *Chit. on Bills*, 163. The indorser of a note, knowing the insolvency of the maker, has no right to insist on notice: *De Berdt v. Atkinson*, 2 H. Black. 336. Indorsing the note of a maker whom the indorser knows to be insolvent, seems to be precisely equivalent to drawing on one who has no funds. The reason of the law requiring notice to the drawer of a bill, is that he may withdraw his funds and secure himself. If he has no funds in the drawer's hands, notice is unnecessary.

Axson, contra. Every contractor is bound by the terms of his contract. The indorser of a note contracts to pay if the maker does not, and due notice is given him of his default. He makes it a condition of his liability that notice should be given to him, and whether it is of advantage to him or not, it must be performed. *Nicholson v. Gouthill*, 2 H. Black. 609, overrules the case of *De Berdt v. Atkinson*. Neither death nor insolvency, nor the drawee's having informed the holder that the bill would not be paid, does away with the necessity of demand and notice: *Chitty on Bills*, 223-4-5.

By Court, HUGER, J. As soon as a note is indorsed, it is assimilated to a bill of exchange. The indorser becomes the drawer; the maker, the acceptor, and the indorsee the payee; and the law relative to bills becomes applicable to it. The note in question, then, was a bill drawn on Cook by defendant, and payable to the plaintiff. The law implies a promise on the part of the drawer to pay the bill, if the acceptor does not; provided notice of default, on the part of the acceptor, be given to the drawer in a reasonable time by the payee. Notice is an im-

portant part of the contract, and is as binding though implied as if expressed. If the drawer has funds in the hands of the drawee, it enables him to take steps for their security; and if he has not, he is afforded an opportunity of making arrangements to pay the bill, and it may prevent a different appropriation of his funds. Were it, therefore, *res integra*, I should be opposed to the exception, now too well established by authority to be shaken, that a want of funds in the hands of the drawee dispenses with the necessity of notice to the drawer. I am not satisfied to rest this exception on the ground of fraud. Bills may frequently be drawn by one who has no funds in the hands of the drawee, without the smallest imputation of fraud. If fraud does exist, it must vitiate this, as it does all contracts, *in toto*. It has been contended at the bar, that insolvency comes within the reason of the exception already noticed, and the case of *De Berdt v. Atkinson*, 2 H. Black. 338, is relied upon as authority. In that case, however, Mr. Justice Buller bottoms his opinion upon the fact that it was an accommodation note, and that no value had been given by the payee for the note. In this case there is no such pretense. The case, however, of *De Berdt v. Atkinson*, has since been impeached and overruled. Mr. Bayley (third ed. 136), in his Treatise on Bills, observes that the court appear to have proceeded on a misapplication of the rule which obtains as to accommodation acceptances; in those cases, the drawee, being himself the real debtor, acquires no right of action against the acceptor by paying the bill, and suffers no injury from the want of notice. But in the case of *De Berdt v. Atkinson*, the drawer was not the real debtor; he was only security, and was, therefore, entitled to notice. The case of *Sisson v. Tomlinson*, see 15 East, 222,¹ was decided by Lord Ellenborough on the authority of *De Berdt v. Atkinson*; but in *Smith v. Beckett*, 13 East, 189,² the court, with Lord Ellenborough, held that notice was necessary in a case of known bankruptcy. In the case of *Kiddell v. Ford*, Treadway, 678,³ this question was considered, but not decided. The application there was for a new trial on behalf of the defendant, against whom a verdict had gone, when no notice of default had been given. The plaintiff had contended with success, in the circuit court, that the reputation of insolvency dispensed with notice. The constitutional court decided that it did not, and ordered a new trial.

1. *Sisson v. Tomlinson*, cited in 15 East, 222; S. C., 1 Solwyn's N. P. 290.

2. *Smith v. Beckett*, 13 East, 189.

3. *Kiddell v. Ford*, 3 Brev. 178.

Mr. Justice Brevard, in his opinion, refers to two cases which have not been reported: *Clark v. Administrator Minton*,¹ and *Kiddell v. Peronneau*, in which he states that it had been held that bankruptcy dispensed with notice. The first was tried before him, and decided upon the peculiar circumstances of the case, as he states, all of which are not enumerated. It does appear, however, that notorious insolvency and absence from the state were proved. These are strong indications of fraud, and unless explained are sufficient to vitiate the whole contract; I presume, therefore, the plaintiff succeeded in that case on the ground of fraud. The other case, *Kiddell and Peronneau*, was not tried before Mr. Justice Brevard, nor was he present when it was argued before the constitutional court; it does not appear that he was then on the bench. The accuracy of his report, under such circumstances, may very well be doubted. Had the whole case been fully reported, it is not improbable that it would appear to have been decided as the first was, on its peculiar circumstances—a phrase too frequently substituted for fraud. I can, therefore, attach no consequence to these cases, and feel myself at liberty to decide the question untrammelled by authority. The motion must be dismissed.

BAY, NOTT, GANTT, JOHNSON, and COLCOCK, JJ., concurred.

INSOLVENCY OF MAKER does not dispense with necessity of notice to charge indorser: *Nash v. Harrington*, 16 Am. Dec. 672; *Kiddell v. Ford*, 6 Id. 569; *Sullivan v. Mitchell*, Id. 546; *Sandford v. Dillaway*, Id. 99; *Crossen v. Hutchinson*, Id. 55; *Bond v. Farnham*, 4 Id. 47, and note, 49.

ORDINARY v. STEEDMAN.

[HARPER'S LAW REPORTS, 287.]

LAPSE OF TWENTY YEARS IS CONCLUSIVE EVIDENCE of the performance of covenants contained in the condition of a bond.

DEBT on a bond, signed by John Moncrief as administrator of the estate of one John Gaborial, and also signed by Cudworth, defendant Steedman's testator, and by defendant Stevens, bearing date in 1785, in the penalty of two thousand pounds. The condition of the bond was that the said administrator should make and exhibit a true inventory of said estate in the ordinary's office at or before the nineteenth of June, 1785, and well and truly administer the same according to law, and also that he should render a true account of his administration on or be-

1. *Clark v. Administratrix of Minton*, 2 Brev. 185.

fore the nineteenth of March, 1786, and that the residue found remaining on said account he should deliver and pay pursuant to the statute. The defendants craved *oyer* of the bond, and pleaded performance; the plaintiff replied non-performance, and set forth breaches of the condition.

The plaintiff proved by the clerk of the ordinary, and by the secretary of state, that diligent search had been made in their respective offices, and that no inventory or account in said estate had been filed or could be found in said offices. Upon the abduction of the bond, and on the foregoing testimony, the plaintiff claimed that he was entitled to recover the amount of the penalty. The judge charged the jury that they might legally regard the lapse of time since the date of the bond as evidence of performance of its condition. The jury gave a verdict for the defendants, from which the plaintiff appealed and moved for a new trial.

Clarke, for the motion.

Pepoon, *contra*.

By Court, Norr, J. The only question in this case is, whether the judge below was correct in instructing the jury the performance of the covenants contained in the condition of the bond might be presumed from the lapse of time. It is now well settled in this state, that the lapse of twenty years is, *per se*, conclusive evidence of the payment of a bond conditioned for the payment of money; and whether a bond is to be discharged by the payment of a sum of money, or by doing any other act, can in my view make no difference in that respect. The presumption is as strong that the act has been performed in one instance as that the money has been paid in the other. Indeed, I think it is stronger, particularly in the case of bonds of a public nature. The performance of the duty does not affect his interest nor impair his estate, like the payment of money. His interest, therefore, consists in the faithful discharge of his duty. Neither are persons interested in the distribution of an estate so much disposed to give indulgence to one who has the administration of it, as those to whom money is due are to a person who is bound to pay out of his own estate. Besides, it is a maxim of law, "*interest reipublicæ ut sit finis litium*." There never would be an end to litigation, if any old paper, sleeping in the desk of a public officer, may, after a lapse of nearly forty years, be dragged from its bed of repose to disturb the peace of a family which has never derived any benefit from it, and may,

perhaps, not even know of its existence. The presumption, to be sure, might have been rebutted by the evidence of any fact which went to show an existing demand; but no such thing was attempted. Mr. Moncrief, the administrator, has been dead but a few years, yet no account of his has been shown, recognizing his liabilities. No claim has been interposed by those entitled to the estate, if there is any. No inquiry has been made by creditors or others interested in the administration. It is unreasonable to suppose that those who had so deep an interest in investigating the subject would have slept over their rights for such a length of time, while the administrator was in the quiet enjoyment of what belonged to them; and it would be still more unreasonable now, when he is dead and gone, to suffer a dormant claim, which has grown gray with age, to be resuscitated against his securities, who it can not be expected have the means of defending themselves against it. I am of opinion, therefore, that the motion ought to be refused.

BAY, COLOOCK, JOHNSON, and HUGER, JJ., concurred.

BROUGHTON v. BIRCHMORE.

[HARPER'S LAW REPORTS, 300.]

DEED VOID FOR UNCERTAINTY.—Sheriff's deed which describes the land conveyed as "all that plantation or tract of land lying in Sumter district," is void for uncertainty; and neither the sheriff's advertisement nor his oral testimony is admissible in evidence to show what land was meant to be conveyed.

TRESPASS to try title. The sheriff's advertisement was offered to show what land was meant to be conveyed. The other facts sufficiently appear from the opinion. A motion for a nonsuit was overruled. There was a verdict for the plaintiff, and the defendant appealed. The motion for nonsuit was renewed on appeal.

Desaussure, for the motion.

Miller, *contra*.

By Court, GANTT, J. The plaintiff founds his claim under a deed of conveyance from the sheriff of Sumter district, and the only description given of the premises intended to be conveyed is: "All that plantation or tract of land lying in Sumter district." The counsel for the defendant, considering the deed void on account of the generality of the description, moved for

a nonsuit, but was overruled, and the plaintiff had a verdict. The same ground is now insisted on.

In a deed, the premises ought to comprehend the certainty of the lands or tenements to be conveyed: 4 Com. Dig. 162. And a grant shall be void if it be totally uncertain; as if a man grant as many trees as can be spared in his manor, or if he grant ten pounds per annum, parcel of his manor, without other certainty: Com. 302. In both these instances, there is at least as much, if not more, of certainty in the description than is furnished by the present deed; but inasmuch as it does not appear what trees can be spared, or from what parcel of the manor the grant of ten pounds per annum is to issue, such conveyance would be void for uncertainty.

Birchmore, the defendant, owned several tracts of land lying in Sumter district; the sheriff conveyed one. It would be as impossible to say, from the description in the sheriff's deed, which of the tracts of land of Birchmore was intended, as in the instance quoted, to say what trees or what parcel of the manor was intended. Hence arose the necessity in this case of resorting to evidence extrinsic to the deed to ascertain and identify the land. The sheriff was called upon to give oral evidence of that which ought to have been shown by his official deed. The execution under which the levy was made, he had lost, or so mislaid as that it could not be come at. It would be dangerous in the extreme to the best interests of the community were this exceedingly loose and very incorrect procedure to be upheld and supported. Where there are so many materials from whence to furnish out description as appertain to lands sold under execution, the omission neither can, nor ought to, be supplied by oral testimony. The certainty required by law should be found in the deed itself, and not sought for *aliunde*. Had the description been, "all that tract of land lying in South Carolina," it would have been just as good as that furnished by this deed. True, it might have increased the perplexity of the alienee to find where it was situated, from the extended limit of the search to be made, but in point of legal certainty, it would have been precisely the same.

I am of opinion that the motion for a nonsuit should prevail, and the *postea* is to be delivered to the defendant.

NOTT and HUGER, JJ., concurred.

HARMAN v. GARTMAN.

[HARPER'S LAW REPORTS, 430.]

ONE TENANT IN COMMON CAN NOT MAINTAIN TRESPASS against his co-tenant, without actual ouster.

TRESPASS for plowing up the plaintiff's land. The defendant and Lites were tenants in common of a tract of land. The defendant had fenced and cultivated the field in dispute for two years. One year previous to the alleged trespass, it was verbally agreed between them what portion each should cultivate. Lites then abandoned the cultivation, and agreed that defendant should cultivate the whole. Afterwards, Lites verbally agreed to lease to the plaintiff the whole field, if the defendant would agree to it; but the defendant would not consent. The plaintiff took possession of the whole field, and planted it without defendant's knowledge or consent. The defendant then plowed up and planted that part of the field which he had planted the year before. For this alleged trespass this action was brought. The judge charged the jury to find for the plaintiff, which was done, and now the defendant moved for a new trial.

Chappell, for the motion, contended that one joint tenant can not maintain trespass against his co-tenant, unless there is an actual ouster: 2 Black. Com. 174, 182. There was no ouster, as the defendant and Lites had agreed that each should cultivate a particular portion of the land, and the defendant only cultivated his own portion, and did not interfere with that of Lites.

Bauskett, *contra*, contended that the trespass was an actual ouster, and, therefore, a good cause of action: Run. on Eject. 192.

By Court, HUGER, J. The plaintiff's rights (if he had any) to cultivate the field, was derived from Lites, who could not give what he himself did not possess. If Lites, therefore, did not possess a right to exclude the defendant, the plaintiff could not. The defendant and Lites being tenants in common of the land, each was seised, in the language of the law, *per my and per tout*, of the whole tract. Each had a right of entering and cultivating the whole; neither could exclude the other, for the power of so doing would be inconsistent with their joint rights. Lites, therefore, could not have prevented the defendant from entering and plowing the field. One tenant in common, for

this reason, can not sustain an action of trespass against another. Had the plaintiff entered and cultivated the field, with the assent of defendant, as well as that of Lites, a different case would have been made. But so far was defendant from assenting to such an arrangement, that it appears he refused to concur in the proposal, and only plowed the piece of land he had cultivated the year before. The motion must, therefore, be granted.

NOTT and JOHNSON, JJ., concurred.

GANTT, J. John Gartman, the defendant, and one Jacob Lites were tenants in common of a tract of land lying in Lexington district. The defendant, Gartman, had occupied the land for two years; on the third year Lites rented the field to the plaintiff, Harman, who repaired the fences, plowed the land, and planted it in corn. When the season was too far advanced to commence a new crop, the defendant went and plowed up the corn, for which wrong this action was brought.

The ground relied on for a new trial is, because the verdict is contrary to law in this, that one joint tenant, or tenant in common, can not maintain trespass, *quare clausum fregit*, against his co-tenant, unless there has been an actual ouster. It is admitted, that where there is an ouster, the converse of the rule holds good, that trespass may be maintained. If this view of the law be correct, it would seem to follow, that under the circumstances of this case, the action was maintainable, because I can conceive of no disseisin more absolute than what took place on this occasion. The plaintiff was in peaceable possession of the tenement by an express contract of lease with one of the tenants in common, and by as clear and indubitable an implied assent on the part of the other, who, although immediately in the neighborhood, did not interpose his equal right in opposition to the act of the other, but suffered the plaintiff to repair fences, plow and plant the corn, and after it was half made, went with high hand and forcibly destroyed the crop of the tenant. If this did not constitute an ouster or disseisin, then they are terms without meaning.

It would be an abuse of language, and a waste of time, to reason on the subject, for the purpose of showing that here was a disseisin committed on the part of Gartman; then, by the admission of the attorney for the defendant, trespass would lie. But suppose that even in case of ouster or disseisin trespass can not be maintained by a stranger, who comes in under a lease

from one tenant in common, in which the other did not at the time actually join so as to entitle the tenant to recover for the entire injury; still it never was denied as law, but what a joint tenant might pass away his undivided interest or estate; consequently, the lease made by Lites to the plaintiff, was good for his moiety in the land, and the right of the tenant for the year would be equal with that of the other tenant in common. Under such circumstances, how was it competent for Gartman to exercise control and ownership over the whole field? He forcibly took from the tenant so much corn as belonged to him, to wit, one half, and for this the action should have been maintained, although possibly he might not, under circumstances other than those which existed in this case, have recovered for the whole. If this be law, then the plaintiff is entitled to retain one half of the sum recovered, and a remittitur should be entered for the rest.

But I maintain with confidence, that according to the principles of the common law, Lites had a right to occupy the land by himself, or his tenant, for two years, the period for which Gartman had used it. Joint tenants stand upon an equal footing; and according to every rule of reciprocity, it was competent for Lites to hold and use the field for the same period that Gartman had held and used it. The latter had taken the profits for two years, and the former was entitled to take them for the same time; and this mode of exercising joint rights, is recognized as a correct rule by elementary writers. To show that the lease made by Lites was not void in law, but good for his part, I refer to Littleton, 286: "A joint-tenant in fee makes a lease for years of the land, to begin presently, or *in futuro*, and dies; it is a severance of the joint-tenancy, and can not be avoided by the survivor; because immediately, by force of the lease, the lessee hath a right in the same land of all that to the lessor belongs."

"If one joint-tenant in fee makes a lease for years, reserving a rent, and dieth, the survivor shall have the reversion, but not the rent, because he claims by title paramount."

"If there be two joint-tenants, and each make a several lease of the whole, their several moieties shall only pass by each lease:" Wills, part 1, fol. 1.

I think, therefore, by the strictest principles of the common law, the lease was good for a moiety. I think that the presiding judge did not err, when he held that under existing circumstances, this was to be considered as the lease of one tenant in

common, confined by the implied assent of the other; and whether this were so or not, that the lease was good for a moiety, and that the verdict should stand. But I think, that by the principles of the common law, Lites was entitled to the exclusive use of the premises the same period of time that Gartman had possessed, therefore entitled to recover damages for the entire injury.

RIGHT OF CO-TENANTS TO USE COMMON ESTATE.—“Some of the authorities declare, in general terms, that joint-tenants, tenants in common, and co-parceners, ‘have a right to enjoy the estate as they please.’ But the enjoyment sustained by these authorities is not a capricious, irresponsible employment of the subject of the co-tenancy; nor does it include such use of the common estate as can arise only in obedience to the promptings of passion, of malice, or of insanity. It is a reasonable enjoyment in some of the ordinary methods of reaping profits from property of like character, and under like circumstances. * * * The acts which either co-tenant may lawfully do to and with the common property, seem to embrace everything not amounting to an ouster of the other co-tenant, or to a *destruction*, in whole or in part, of the subject of the tenancy. A destruction in the case of chattels may be either an annihilation of the chattel, or such a use or disposition of it as results in a practical annihilation of the rights of the other co-tenants therein. A destruction, where the co-tenancy is of real estate, is some act, or series of acts, by which the estate is injured beyond what would result from any of the ordinary and reasonable means of obtaining profit from a like estate.” Freeman on Co-tenancy and Partition, sec. 251.

“Until the destruction of the subject of the tenancy, or at least until the happening of something which, in its effect on the rights of the injured party, is equivalent to such destruction, he can not sustain any action in trespass against his co-tenant, unless the latter has ousted him. Each co-tenant has the right to enter upon the lands of the co-tenancy. His entry can not, therefore, of itself, support an action of trespass. The entry being lawful, trespass will not lie for a subsequent act not amounting to an exclusion of the other part owner, nor to a destruction of the property.” Freeman on Co-tenancy and Partition, sec. 299.

“What is an ouster? As a very decided preponderance of the authorities shows that a co-tenant may sustain an action of trespass against his fellow-tenant, to recover the damages occasioned by an ouster, we are now naturally led to the inquiry, What is an ouster within the meaning of the authorities on this subject? In response to this inquiry, we think the answer of the authorities would be, that in these cases the word ouster has its ordinary signification, viz., ‘an actual turning out or keeping, excluded the party entitled to the possession of any real property corporeal.’ It does not arise from a mere denial of the plaintiff’s title. But any resistance, preventing plaintiff from obtaining effective possession of the land of the co-tenancy, is an actual ouster. Such resistance must, however, be clearly and affirmatively shown; and is not presumed from equivocal facts, which may or may not have been designed to operate as an exclusion. Hence, a finding that the gate of the premises was kept locked, does not establish an ouster, because it does not show that plaintiff was excluded by the locking; or that, at some time, he applied to have it unlocked and was refused. An exclusive appropriation of the land to his own use, by erecting a permanent structure

thereon, would be evidence of an ouster of his co-tenant. But each co-tenant has the right to place a structure on the land, if of a temporary nature and for a temporary purpose. In so doing, he does not indicate any design to make any permanent appropriation, and therefore is not guilty of an ouster." Freeman on Co-tenancy and Partition, sec. 301.

In *Chesley v. Thompson*, 14 Am. Dec. 324, it was held that one tenant in common could maintain an action on the case against another, for the latter's negligence.

HUNTINGTON v. SHULTZ.

[HARPER'S LAW REPORTS, 452.]

SERVICE OF A WRIT OF CAPIAS AD RESPONDENDUM, by delivery of a copy thereof, is not an arrest within the meaning of the act exempting from arrest persons necessarily attending on courts.

A writ of *capias ad respondendum* was served upon the defendant during his attendance as a party to a suit in a court of equity. The defendant moved to set aside the service of the writ, on the ground that he was privileged from the service of this writ during his attendance on the court. The court granted the motion, and the plaintiff appealed.

By Court, RICHARDSON, J. The question in this case depends upon the act of 1791: 1 Faust, 44; 1 Brevard, 223; which enacts that "all persons necessarily going to, attending on, or returning from the same" (referring to the superior courts), "shall be freed from arrest in any civil action." Now, what does the term "arrest" mean? Wood, see Institutes, 595, defines it: "A detention of the person." And Blackstone, vol. 3, p. 288, says: "An arrest must be by corporal seizing the defendant's body; after which the sheriff may justify breaking open the house, in order to take him;" and in page 289, he says: "When the defendant is arrested, he must either go to prison, or put in special bail to the sheriff." These authorities show that an arrest is synonymous with actual detention of the person of the party arrested; and does not mean merely a summons, or citation.

The scope and object of the act of 1791, too, evidently require no more than that the person of the party attending court shall be free from detention; and he may be cited or summoned without any detention of his person. Blackstone gives an apt illustration of the distinction when he says, p. 288, etc., "that in the civil law, for the most part, not so much as a common citation or summons, much less an arrest, can be exercised upon a man within his own walls." And our act of 1794, ex-

empting militia men, when at muster, from the service of any writ, equally points out the same distinction.

The motion is granted.

JOHNSON, HUGER, and COLCOCK, JJ., concurred.

GLENN v. McCULLOUGH.

[HARPER'S LAW REPORTS, 494.]

ACKNOWLEDGMENT OF A DEBT is sufficient to take it out of the operation of the statute of limitations, although there has been no new promise.

ACTION on a promissory note given for tobacco. The defenses were that the tobacco was worthless, and the statute of limitations. The following statement of the defendant was relied upon to take the case out of the statute: "I gave the note, but it was given for rotten tobacco, and I will never pay it; but I will not plead the statute of limitations." A motion for a nonsuit was overruled, and the jury found for the plaintiff. A motion was now made for a nonsuit, and also for a new trial.

Thompson, for the motion, contended that some promise within four years, was necessary to take a case out of the statute: *Lawrence v. Hopkins*, 13 Johns. 288. No inference of a promise, express or implied, can be drawn from an admission accompanied by words denying the plaintiff's right to recover: *Sands v. Gelston*, 15 Johns. 518; *Danforth v. Culver*, 11 Id. 146 [6 Am. Dec. 361]. There was no consideration for the new promise not to plead the statute.

Irby, contra, contended that where a party admits his signature to a note, he affirms the very fact of which the statute raises the presumption; he is bound to prove the truth of all words accompanying his admission: *Dean v. Pitts*, 10 Johns. 35.

By Court, RICHARDSON, J. It is now well settled that an acknowledgment of a debt is sufficient to take it out of the statute of limitations, though there has been no new promise: 12 Vin. 192; 2 Sand. 64, note; 11 Johns. 146. In the case before us the defendant plainly acknowledged the note to be his, which takes it out of the statute, but said he would not pay it, because given for rotten tobacco, and yet that he would not plead the statute. Here then he takes upon himself the burden of showing a want of consideration after acknowledging the debt. It is, in my opinion, precisely like the case of *Dean v. Pitts*, 10

Johns. 35, where the maker of a note admitted it to be his, but said he would make it appear that it had been paid, which was held to cast upon him the necessity of proving payment.

The motion is refused.

As affording instances of acknowledgments held sufficient to revive a debt barred by the statute, see the following cases: *Lee v. Perry*, 15 Am. Dec. 650; *Mellick v. De Seelhorst*, 12 Id. 172; *Burden v. McElhinney*, 10 Id. 570, and note, 571; *Seaward v. Lord*, Id. 50; *Lord v. Shaler*, 8 Id. 160, and note, 162; *Jones v. Moore*, 6 Id. 428; *Danforth v. Culver*, Id. 361; *Bell v. Rowland*, 3 Id. 729. And for instances of acknowledgments held not to be sufficient, see *Bangs v. Hall*, 13 Id. 437; and *Fries v. Boisselet*, 11 Id. 683.

CASES
IN THE
COURT OF APPEALS
OF
SOUTH CAROLINA.

STATE v. BENNETT.

[HARPER'S LAW REPORTS, 508.]

WHAT CONSTITUTES FORCIBLE ENTRY.—Where a man, at the time of his entry, by his behavior or speech, gives those in possession cause to fear that he will do them bodily harm unless they give way to him, his entry will be deemed forcible.

WHERE A PERSON ENTERS PEACEABLY, but turns the party out of possession by force, or frightens him out by threats, he is guilty of a forcible entry; and one who enters peaceably in company with another who enters forcibly, will be held guilty of a forcible entry.

DEFENDANT'S TITLE IS NOT ADMISSIBLE IN EVIDENCE under an indictment for forcible entry and detainer.

OPERATION OF WRIT OF RESTITUTION IS NOT SUSPENDED BY APPEAL where such writ was awarded on conviction of forcible entry and detainer.

INDICTMENT for forcible entry and detainer, by turning Perry out of possession of a farm. Perry was in the peaceable possession of the farm in question, under a lease from Quin for one year. After he had enjoyed and cultivated it for about six months, Bennett informed him that he had just leased the farm from Quin, and asked him to surrender possession to him. This Perry refused to do, as he had a crop in the ground; whereupon Bennett told him that if he did not give it up peaceably, he would take it. Shortly after, Perry returned to the farm and found Bennett and Chitty sitting in the house on the lot. Bennett rose and demanded of Perry what he wanted in the house, and on the latter asserting his right thereto, he became very angry, and finally ordered Perry out of the house. Perry went away, leaving Bennett and Chitty in the house. Chitty was present as a friend of Bennett, but said nothing to Perry. The other

facts are sufficiently stated in the opinion. Defendants appealed on the grounds: 1. That their possession having been peaceable, they ought to have been allowed to show the title under which they entered; 2. Because Perry was not in actual possession at the time of the entry complained of; 3. Because there was no force of any kind on the part of Bennett, either in taking or retaining possession; 4. Because there was no evidence against Chitty, more than his being present.

White & Rice, for the motion.

Petigru, attorney-general, *contra*.

By Court, COLLOCK, J. The first ground is defective in its foundation. It is said the entry was peaceable, and that when an entry is peaceable the owner may detain by force. From the report of the judge, as to the facts, and the well-established doctrine of law on those facts, the entry was, to all legal intents and purposes, a forcible entry. "Whenever a man, either by his behavior or speech, at the time of his entry gives those who are in possession of the tenements which he claims, cause to fear that he will do them some bodily harm, if they will not give way to him, his entry is esteemed forcible, whether he cause such a terror by carrying with him an unusual number of servants, or by arming himself in such a manner as plainly intimates a design to back his pretensions by force; or by actually threatening to kill, maim, or beat those who continue in possession; or by giving out such speeches as plainly imply a purpose of using force against those who shall use any resistance: and though a man enter peaceably, yet if he turn the party out of possession by force, or frighten him out of possession by threats, it is a forcibly entry:" 1 Russell on Crimes, 426; Bac. Abr., tit. Forcible Entry (B); 1 Hawk. P. C., c. 28, sec. 27; Dalt. 299.

Here, then, was all that required. The defendant, Bennett, accompanied by his friend, after he had entered, said to the prosecutor that he would use force if he did not give way to him. It is scarcely necessary to make any observation on the second ground, for if the prosecutor was not in the possession of this land, it is not possible to possess land. It was inclosed; it was cultivated—the crop was growing on it, and he resided near it, and was in the habit of going to it daily. The circumstance of Bennett's fence forming part of the inclosure, can not affect the case. It was contended that there was no evidence to support the verdict against Chitty. But it

may be asked why he was there. The entry by Bennett was unlawful, and the purpose of his friend can not be doubted; his presence, unless accounted for, is sufficient to warrant the verdict of the jury. "A single person may commit a forcible entry as well as a number, but all who accompany a man when he makes an entry, will be deemed to enter with him, whether they actually come upon the land or not. So, if several come together, where their entry is not lawful, and all of them, except one, enter in a peaceable manner, and that one only use force, it is a forcible entry in all of them, because they came in company to do an unlawful act." Russell on Crimes, vol. 1, p. 417; 1 Hawk. 64, sec. 22.

Much stress has been laid on the refusal of the judge to admit the title of the defendant to be given in evidence. But his answer to this is conclusive. This is not a mode of trying the titles of the parties. It was in evidence that Quin had given a lease to the prosecutor for a year, which had not yet expired; he could not, therefore, have given the defendants any authority to dispossess the prosecutor; he could not have done so himself. The possession, and not the right to the soil, is what the statutes protect. The last ground objects to the issuing the writ of restitution. But if an appeal is permitted to suspend the restitution, the object of the statutes will be in a great measure defeated. The great object of the statutes was to preserve the peace of the country. The first that were passed only provided a punishment for the force. But it was found that this was not sufficient. For men would incur punishment to regain the possession of property which they might want the use of, or which they had injudiciously parted with. The statutes, therefore, of Henry VI. and James I. provided for the immediate restitution on the finding of the force, and it has been the practice of our courts. It was so decided in the case of Dr. Watkins, and may be considered as analogous to the case of an injunction to stay waste. For in the case before us the term had nearly expired, and the prosecutor would have lost his possession and his property both, and might have been left to want. The motion in arrest of judgment was not regularly made, but it is the duty of the court to attend to it whenever made. For they can not pronounce the sentence of law on a defective record. The indictment, however, in this case, for all the purposes which yet remain to be executed, is a good and sufficient indictment. The objection goes only to the matter of restitution; and as to that, it is not now important

that it should be considered, for the term for which the prosecutor has leased has expired, and it is said he is out of the possession. The motion is refused.

STONEY v. McNEIL.

[HARPER'S LAW REPORTS, 657.]

ATTORNEY IS NOT PRIVILEGED FROM DISCLOSING FACTS which he might have known without being an attorney in the cause.

WHERE A BOND ASSIGNED IN BLANK is left by the assignee thereof, in the possession of a person to whom one of the obligors, not knowing that the person so holding it was not the real owner, paid a portion of the amount payable thereon, such payment will be deducted from the amount due on the bond; but an agreement by such holder, to release the obligor from all further liability on the bond, will not bind the assignee.

DEBT on a bond given by defendant, and William and John Walton, to Alexander Henry. On the bond there was indorsed an assignment by Henry to Stoney, and also a special guarantee of it indorsed by Brown. There was a receipt for a portion of the amount of the bond written on it by Brown, in which, in consideration of the sum paid by McNeil, he exonerated him from any further responsibility on it. Defendant asked the witness, Bennett, whether or not the assignment on the bond was in blank, when Stoney gave it to him to sue. He declined to answer on the ground that it would betray professional confidence, since he had no knowledge on the subject except from the interview with Stoney. The court decided that he must answer. He then stated, under protest, that the assignment was filled up by his advice in his office, and that the receipt and guarantee were at that time on the bond. The judge charged the jury that the payment by McNeil to Brown was a good payment, but that it was only a discharge *pro tanto*. The jury found a general verdict for the defendant, and the plaintiff moved for a new trial.

Lance, for the motion.

Petigru and Harper, *contra*.

By Court, JOHNSON, J. The grounds for this motion present only two questions for the consideration of the court: 1. As to the admissibility of the evidence of Mr. Bennett, the attorney of the plaintiff. 2. The effect of the payments of Joshua Brown, and the acquittance or release indorsed by him on the bond.

1. The relation of client and attorney is one of the most delicate and important which can well exist amongst men. On the one hand it elicits the most unreserved confidence, and on the other it should impose the most profound secrecy. Hence the rule, founded as well on the principles of pure morality as on the positive injunction of the law, that an attorney shall not be permitted to disclose the secrets of his client as evidence against him, not as a privilege, to which the attorney himself is entitled, but as a protection to the client against an abuse of the confidence which the law invited him to repose on his counsel, and which his situation rendered indispensable. About the rule itself no one has doubted, and the only difficulty has been in distinguishing between those facts which may be denominated confidential or professional secrets, and those which are not.

Judge Buller (N. P. 284), in remarking on this rule, excludes: 1st, those facts which came to the knowledge of the attorney before the retainer, for the obvious reason that they did not grow out of the relation of client and attorney; 2d, facts of which he might have had knowledge without being attorney in the cause; as where he is a witness to a deed produced in the cause, there he may be examined as to the true time of its execution; so when the question was about an erasure on a deed or will produced on the trial, he may be examined on the question, whether he had before seen it in a different plight, for that, he adds, is a fact within his own knowledge.

Let us now test the objections raised to the evidence of Mr. Bennett, by these modifications of the rule. The assignment of the bond was in blank; it had been subsequently filled up, and Mr. Bennett is asked whether he had not seen it in its former situation, or, in other words, whether he had not seen it in a different plight; so that the fact falls directly under the very letter of the second modification of the rule. The questions when, where, and for what purpose it was filled up, follow in consequence, as necessary appendages, and constitute facts within his own knowledge, and which he was properly directed to disclose.

Conclusive as this authority is on the question, there are facts connected with it which deserve to be stated, and which of themselves would clearly take the case out of the general rule. In the case of *A. Henry v. John Stoney et al.*, determined in the court of equity, and to which the plaintiff was a party, it became necessary for him to show at what time and under what circumstances, and for what purpose, the assignment was filled up, and

Mr. Bennett was called by him and did testify as to those facts; and, on a former trial of this case, he gave the same evidence without any objection on the part of the plaintiff being interposed; so that, in the one case directly and in the other indirectly, he gave publicity to it. It had been given to the witness by the plaintiff himself, and no longer remained a secret under the sacred shield which guards the relation of client and attorney; and if one is wounded by the weapon which he himself has unsheathed, he has no right to complain.

2. To come at a correct view of the second question, it will be necessary to take a brief view of the facts which relate to it. The bond was given by the defendant and the Waltons, and made payable to Henry; and the assignment by him was intended to inure to the benefit of the plaintiff in fulfillment of a certain agreement. Brown had the possession of the bond for a considerable time, and while the assignment was yet in blank, and under circumstances which, if the defendant was really ignorant of the truth of the matter, would have authorized him to regard Brown as the real owner, and consequently would have protected him in any payment which he might have made him on that account, and, in the absence of any proof on the subject, his ignorance of the character in which he held it may be fairly presumed, and clearly justified the jury in drawing that conclusion.

But there is not the shadow of a pretense to be deduced from the evidence that the bond belonged to Brown, either legally or equitably; all the facts go to prove the contrary. Indeed, there was something like an impossibility that he should, for he had guaranteed its payment; it had not been paid by the obligors, nor by him as guarantee; it could not, therefore, belong to him. The question, therefore, whether the part payment of a bond is a sufficient consideration to support a contract on the part of the obligee to release the whole, and on which the counsel have exhibited so much learning and research, does not necessarily arise out of the case; and as it is not altogether free from difficulties, the court will reserve it for a future occasion. The question does not arise out of the case, because, whatever might have been the effect of such a contract between the obligor and obligee, or other person legally entitled to the bond, Brown did not stand in that relation; he was a stranger to the parties interested, and whatever claims Brown's possession of the bond might give the defendant on the plaintiff, on account of payments made to Brown on the faith of his possession, they are

clearly bounded by the actual injury which he sustained, or, in other words, by the sum which he paid. Brown had no interest in the bond, legally speaking; he was not, therefore, entitled to receive the money upon it, or to make any stipulation about it; but the equitable language of the defense is, that the plaintiff, by suffering him to have the possession indorsed, as it was in blank, seduced the defendant into the belief that he was the rightful owner; and confiding on these appearances, he paid the amount credited on the bond, and entered into the agreement to be exonerated from any further liability. Let it then be asked, What injury has the defendant sustained by the act of the plaintiff? He owed the whole amount of the money, secured by the bond, to the plaintiff. The answer must, therefore, be, that he is injured to the extent of the payment made to Brown, and when he is credited with that, he stands precisely in the situation he would have done if it had never been in Brown's possession.

The court, therefore, concur with the presiding judge, that the contract with Brown did not discharge the defendant from further liability on the bond, and on this ground the motion for a new trial is granted.

CASES
IN THE
SUPREME COURT
OF
VERMONT.

BOWKER v. WALKER.

[1 VERMONT, 18.]

ONE WHO ENTERS UNDER A CONTRACT FOR THE PURCHASE of lands, and makes permanent improvements, can not, before complying with the terms of the contract, convey to another a title, which, though buying in ignorance of the contract, he can set up against the person with whom it was made.

EJECTMENT. Plea, not guilty. The plaintiff claimed under mesne conveyances from Waitstill Sargent, by a purchase in connection with J. Sargent from Thompson. In 1807, the plaintiff entered into an agreement in writing between himself and Joseph Hoar, from the sale and purchase by the latter of the land in dispute, at a certain sum per acre, to be paid for in three years. Hoar entered upon the land, made certain improvements, and before completing the payment of the purchase-money, conveyed to his son. By several mesne conveyances the premises came to the defendant. There was no evidence that the mesne grantees or the defendant knew of the plaintiff's claim; and no title adverse to that of the parties of record was shown to exist, or to be asserted by any person. On these facts, the court directed a nonsuit, subject to the opinion of the court.

Hutchinson and Marsh, for the plaintiff. Hoar, who entered under the contract for the purchase of the land, could not dispute the plaintiff's title: *Jackson v. Bond*, 4 Johns. 230; *Smith v. Lorrillard*, 10 Id. 338; *Jackson v. Dobbin*, 3 Id. 223. And one who claims under Hoar, stands in the same relation to the plaintiff, and can not resist his title: *Davis v. Pierce*, 2 T. R. 53; *Jackson v. Hazen*, 2 Johns. 22; *Jackson v. Whitford*, 2 Cai. 215.

Washburn, for defendant.

By Court, ROYCE, J. The general question submitted is, whether the plaintiff at the trial made out a case which, if uncontradicted and not at all weakened by evidence on the other side, would entitle him to recover. The original title to the premises in question does not appear. Ezra Sargeant, having a color of title under Ranny's deed to a tract including these premises, sold one hundred and thirty acres thereof to Timothy Thompson, who entered and made improvements upon that part of his purchase lying north of the stream called William's river; the part on the south side, and being the one hundred acres now sued for, remaining entirely wild. A difficulty is here presented in determining how far this possession affected the one hundred acres, because we are not informed by the case whether the whole purchase of Thompson was surveyed, or inclosed within visible lines or monuments. That he claimed the one hundred acres is certainly to be inferred from his purchase and sale of the same. In 1803 Thompson re-conveyed to Ezra Sargeant, who immediately deeded to Jabez Sargeant the whole tract claimed under Ranny's deed. Jabez Sargeant thus acquired a color of title, and the possession of Thompson, whatever it was. At the same time a connection of some sort is discovered between Jabez Sargeant and the plaintiff, in relation to this property; the plaintiff having joined with Sargeant in the note to Thompson, and erected a saw-mill on the twenty acres in dispute, which was doubtless done with Sargeant's consent. Under these circumstances the agreement between the plaintiff and Joseph Hoar was concluded under their hands and seals in January, 1807. In this transaction the consent and co-operation of Sargeant are distinctly seen; he having drawn up and witnessed the contract, and consented to hold it for the benefit of the parties. He could never after this have interfered to the prejudice of Hoar in violation of that agreement. The entry of Hoar was by express permission of the plaintiff, under this agreement to purchase; and that he considered his possession as subject to the contract of purchase appears from the payments which he made. It follows, in view of all this, that he could not have obliged the plaintiff to show a title to the land in an action for the possession. He could only fulfill his contract or surrender the possession. In saying this, we do not go the whole extent of the cases cited for the plaintiff. The plaintiff must be equally entitled to recover against this defendant, unless his situation is different from that of Hoar. He is under-

stood to have purchased in good faith for a valuable consideration, and without notice of any agreement or connection between Hoar and the plaintiff. And hence it is contended that the agreement has no influence upon the property in the hands of the defendant, whatever it might have had while the possession remained with Hoar. It is certain, however, that the possession of Hoar is the main ground, if not the sole origin, of the defendant's title; and that possession was subservient to an acknowledged paramount right of the plaintiff. This being the character of the possession, till within a few months of the defendant's purchase, it is more than we can say, from what has yet appeared in the case, that in that short period its character was wholly changed.

We are not to inquire whether the agreement could be rendered invalid by reason of fraud, since no such inference necessarily results from the facts now in the case, nor whether a question may exist for presuming it abandoned or discharged by the plaintiff, from a conscious inability to make the title which he had stipulated to give. No such ground is yet disclosed, and if it were, the jury and not the court should make the presumption. We, therefore, think that the non-suit was improperly advised and that a new trial must be granted.

We have come to this result chiefly in reference to the larger tract demanded, and no opinion is expressed whether a new trial would be granted, were the twenty acres the only subject of dispute.

New trial granted.

HUTCHINSON, J., being of counsel in the cause, did not sit in the trial.

CHITTENDEN v. BARNEY.

[1 VERMONT, 28.]

APPORTIONMENT OF MORTGAGE DEBT.—One who has a mortgage upon two or more tracts of land, in one of which a third person becomes interested, may be compelled to apportion the debt according to the value of the different tracts, and release to the third person his tract on his paying the proportionate share, or assign the whole mortgage to the third person on his paying the entire sum due.

SAME.—If the third person has become interested by necessity, and not for purposes of speculation, he may exercise a choice either to take an assignment or have an apportionment.

THE EQUITABLE SITUATION OF THE PROPERTY at the time the third person became interested must be regarded.

Two causes were heard at the same time. The one was a bill to foreclose a mortgage given by Barney to Chittenden in 1817 upon a tract of land in which the co-defendant, Howe, subsequently became interested. The other was a cross-bill filed by Howe against Chittenden and Barney, stating that the mortgaged premises consisted of one hundred and six acres; that execution under a judgment against himself and Barney for the latter's proper debt was levied on a six-acre piece of the premises, and in November, 1821, sold to him, Howe. The cross-bill prayed that the mortgage might be apportioned so that Howe might have the six-acre tract discharged upon paying the proportionate amount for which the six acres was responsible; or that Chittenden might be decreed to accept the payment of his whole debt from Howe, and execute to him an assignment of the mortgage; and for general relief. By the answers it appeared that in July, 1821, Barney had sold all the mortgaged premises except the six acres for his own benefit, Chittenden having engaged by parol to release his claim under the mortgage; that the release was accordingly given in 1822, without consideration. The original bill was taken as confessed.

Allen, for the orator, Howe. If Howe be compelled to pay the entire debt, he ought to have an assignment of the whole mortgaged premises: *Cheesebrough v. Millard*, 1 Johns. Ch. 413, 414 [7 Am. Dec. 494]; *King v. Baldwin*, 2 Id. 560 [8 Am. Dec. 415, in note]; *Sells v. Bedient*, Id. 394; 1 Madd. 236, 250. But as Chittenden has put it out of his power to assign the entire mortgage, he having released a large portion of it, the orator ought not to be compelled to contribute more than a proportion: 1 Madd. 237; 1 Johns. Ch. 412; *Stevens v. Cooper*, Id. 430 [7 Am. Dec. 499].

Adams, for Chittenden.

By Court, ROYCE, Chancellor. The court recognize the doctrine of equity that when a charge or burden rests upon distinct funds or portions of property and a third person becomes interested in one of them, he has a right to throw the burden upon the other fund or estate, if the interests of the incumbrancer are not thereby impaired; or upon discharging the incumbrance, to have an assignment of the prior securities; or to have the burden apportioned upon the several parts of the property charged so that his share may be preserved to him on discharging a just proportion of the general incumbrance. It is sufficiently evident that the first mode of relief is not applicable to a case of

this description, since the court can not justly deprive a mortgagee of his security upon the whole of the mortgaged premises. We can only regulate his manner of holding the security and enforcing payment. It is also said by the orator that the second mode of relief is not to be applied here, because the mortgagee, subsequently to the orator's purchase, has released a part of the mortgaged premises, and therefore that the orator is entitled to an apportionment. We think, however, that either of the latter modes may be properly decreed on this occasion. We are to look at the equitable situation of the property at the time of the orator's purchase. At that time Chittenden must be considered as under obligation to release to Barney or his grantee that part of the Hubbell farm lying east of the road, and his security was upon the remaining estate only. This is the estate by which assignment or apportionment must be made. To hold a different doctrine would be to punish the mortgagee for the exercise of that benevolence by which he was induced to relinquish a part of his security.

As the orator was probably influenced to make the purchase by the situation in which he stood as bail for Barney, he appears in a better character than that of a mere speculator or a volunteer. He is therefore to have that choice between assignment and apportionment, which, under other circumstances, would more properly rest with Chittenden. The orator will be permitted either to pay to Chittenden the amount of his debt, and take a conveyance of all the property now holden by the mortgage, he to pay such proportion of the debt as the value of the orator's purchase bears to that of all the estate holden in security, otherwise a common decree of foreclosure in favor of Chittenden to take effect, and in either event a decree passes against Barney. To enable the orator to avail himself of the alternative here given, we find from the evidence the value of the orator's purchase to be three hundred dollars, and that of the remaining estate to be fourteen hundred dollars.

THE FOLLOWING CRITICISM of this decision is made by Judge Redfield, in the course of the opinion of the court delivered by him in *Gates v. Adams*, 24 Vt. 70, 74: "We think the case of *Howe v. Chittenden*, 1 Vt., carried the notion of apportioning a mortgage security upon the different parcels of the security further than is altogether consistent with the rights of the mortgagee. Under our practice, a sale of the premises is never decreed. All, then, which would be consistent with the rights of the mortgagee is to apportion the mortgage upon the land according to value, and first foreclose the mortgage, then give a time for the owner of each portion to redeem his portion, and upon failure, to be foreclosed, and if both or neither redeemed,

that will end it. If one redeems his portion, and the other not, then the one redeeming his own must also redeem the other, or forfeit the whole estate, and if he does, then he is to be allowed to take the whole estate. This will do equity to all parties, and it is the only way it can be done under our practice, as it seems to me."

MARTIN v. MARTIN.

[1 VERMONT, 91.]

ADMINISTRATOR CAN NOT IMPEACH THE DEED of his intestate as fraudulent against creditors, although there be no other fund from which their debts can be paid.

EJECTMENT. The plaintiff, administrator of John Martin, under whom the defendant claimed, sought to impeach the deed given to the latter by the intestate, on the ground that it was fraudulent against creditors. The question submitted was upon the admissibility of the evidence showing the fraud, the court below having rejected it.

Adams, for the plaintiff.

Bailey, *contra*.

By Court, HUTCHINSON, J. The only question presented in this case is, whether the court decided correctly in excluding the testimony offered by the plaintiff to prove that the deed from the intestate set up by the defendant was executed for the fraudulent purpose of defeating his creditors in the collection of their debts? If this were admissible at all, it would not avail as against the defendant, unless accompanied with testimony to show him conscious of the fraud before or at the time of his purchase. This is urged as a point in the defendant's brief, and has been so long and so repeatedly decided as not to be considered *vexata questio*, and the case does not state any offer of the plaintiff to prove the defendant conscious of this fact. This would seem a defect in the statement offered. But that which the plaintiff's counsel have urged will be considered. Our statutes, see p. 171, sec. 14, and p. 266, sec. 7, render fraudulent conveyances void as against the person whose right, debt, or duty is intended to be avoided; but not so with regard to the person conveying. He is not permitted to avail himself of his own wrong to avoid his deed. It would not be good policy to hold out such inducements to fraudulent contracts, as to suffer a man to transfer his property to avoid payment of his debts, and when that object is gained, recover back his property. This is neither admitted by statute nor common law.

The property thus conveyed is fatally gone from the person conveying. The plaintiff claims as administrator, and for the benefit of creditors; and this is urged as the only method by which creditors can exert their right over the property thus conveyed to their injury. But the court consider that the powers of the administrator extend only to the rights which the deceased possessed at the time of his decease. He literally represents the deceased for all the purposes of collecting and paying his debts, and settling his estate, and can recover as administrator in no case in which the intestate could not have recovered, were he living. The court are not called upon to decide whether the creditors have any remedy upon the facts in this case. There would be great difficulties in any action at law. For they can maintain no action for the land without first obtaining a title by levy, and in order to do that, they must bring an action against the administrator; and this is prevented by the insolvent representation, unless in a very improbable occurrence, which would render the administrator liable in his own right.

If no remedy at law can be devised, that will afford one reason for applying to the court of chancery, whose decision might do justice to the creditors, without the absurd consequence of giving the surplus, if any, to the heirs of the intestate who had thus fraudulently conveyed. But the court are not disposed to anticipate all the difficulties that might be raised to an application in chancery, nor all the ways in which the same might be obviated; yet that course appears at present more plausible than any action at law. However, whether there may or may not be another and better remedy, this action in favor of the administrator can not be maintained against the deed of his intestate, which conveyed all his right to Frazer, under whom the defendant shows title. The testimony offered by the plaintiff was correctly excluded, and judgment must be entered according to the verdict.

THE RECOVERY BY EXECUTORS AND ADMINISTRATORS of assets fraudulently transferred by the decedent, is discussed in the note to *Ewing v. Handley*, 14 Am. Dec. 157.

LAMPSON v. FLETCHER.

[1 VERMONT, 168.]

A SHERIFF IS NOT A TRESPASSER when he levies an execution upon the property of the maker of a note under a judgment recovered by an indorsee, although the maker forbids the sheriff to proceed, and shows him a discharge from the nominal plaintiff.

TRESPASS brought by Lampson against Fletcher, a sheriff. The case appears from the opinion. Judgment for the defendant.

Hector Adams and Swift, for the plaintiff in error.

Blodget and Allen, *contra*.

By Court, HUTCHINSON, J. The court are equally disposed to protect the *bona fide* assignee of a note in his right of action, if any such right exists upon the note, and the rights of the signer of the note to make any defense that exists before he has notice of the assignment; but we think each must attend to his rights in proper season, and not, by letting the proper season go by neglected, so pursue his rights afterwards as unnecessarily to embarrass the rights of the other party, and more especially the rights of a public officer. In this case, when the note was sued, the defendant, Lampson, ought to have made his defense, whether it were an offset or discharge from Jennison, before judgment against him. The suit was then under the care of Austin, the assignee, and he would have had opportunity to meet this defense and show it unjust, if he could. But Lampson, instead of thus preferring his defense where Austin could know and meet it, takes his judgment in his action against Jennison, of which action Austin was probably ignorant; if not, he had no right to appear in it; and while Austin's execution is in the hands of the sheriff, he procures a discharge from Jennison, by offsetting judgments, and shows this discharge to the sheriff, and forbids his proceeding with the execution, while Austin, whose ownership was known to Lampson long before his suit upon the note, asserts his right to control the execution, and directs the sheriff to proceed. He follows the direction of Austin, levies upon a wagon of Lampson, for which he brought his action of trespass.

Under these circumstances, the sheriff did right in obeying Austin. Lampson had neglected his defense till the note had passed into a judgment, which warranted the execution, which was *prima facie* a good authority to take the wagon. Lampson had no right to stop the course of this execution by a discharge merely from Jennison, who, as Lampson knew, had conveyed the note to Austin. If he would stop the progress of the execution in this stage of it, he must resort to his *audita querela* in which the merits of his claim may be tried, and his bonds to prosecute will keep good and safe the rights of Austin while the matter is in litigation.

In the course taken by Lampson, Fletcher must either obey or disobey a regular and legal execution at the peril of deciding correctly a dispute between Austin and Lampson about the defense which Lampson had, but did not make, to the note assigned to Austin. If he decided this point wrong and obeyed the process, Lampson treats him as a trespasser. If he decided the same point wrong and disobeyed the process, Austin has his action in the name of Jennison for such neglect.

It will not do to sanction a course which necessarily places a sheriff in such a dilemma. When a discharge is shown to a sheriff from the person who is the owner of the debt, and the sheriff knows him to be the owner, and has no doubt about the fairness of the discharge, if the sheriff should proceed with the execution regardless of such discharge, he would probably be considered a trespasser. But he must not be so considered in the present case. He was not obliged to take the responsibility of disobeying both the directions of Austin, who gave him the execution, and the precept of the execution itself: *Luddington v. Peck*, 2 Conn. 700.

The judgment, therefore, of the county court, which was in favor of the sheriff, is affirmed, with additional cost.

HAVEN v. HOBBS.

[1 VERMONT, 238.]

THE PAYOR'S SIGNATURE AFFIXED BY THE NOMINAL PAYEE to a promissory note, will bind the payor.

IT IS SUFFICIENT CONSIDERATION FOR A NOTE that it was given for the discharge of bastardy proceedings instituted by the mother against the father, the maker of the note.

A RECEIPT EXECUTED BY THE NOMINAL PAYEE in fraud of the person for whose benefit the note was given, is void.

ASSUMPSIT on a promissory note. Verdict for the plaintiff. Motion for a new trial on exceptions taken by the defendant. The signature of Hobbs was affixed by Luther at his request; the note was given in consideration of the dismissal of bastardy proceedings instituted by the plaintiff's sister against the defendant, the reputed father of the illegitimate child; and was made payable to the plaintiff by consent of all concerned, although he had no interest in the note. A receipt signed by the plaintiff for the amount of the note was given in evidence. It was on these points that the question in the case arose.

Linsley and Waller, and S. S. Phelps, for the defendant. Evi-

dence in contradiction of the receipt, tending to show who was the real payee in the note, ought not to have been admitted: *Bauerman v. Radenius*, 7 T. R. 663; *Rez v. Hardwick*, 11 East, 583; *Craib v. D'Aeth*, 7 T. R. 670; *Bulkley v. Landon*, 3 Conn. 76. There was no valid consideration for the note: *Wilde v. Griffin*, 5 Esp. 143; *Cole v. Gower*, 6 East, 110; *Watkins v. Hewlett*, 1 Brod. & B. 1; *Townson v. Wilson*, 1 Camp. 396.

Bales, contra.

By Court, TURNER, J. This case presents three questions: 1. Whether Hobbs' note was invalidated by the fact that his name was signed by the payee, at his request; 2. Whether it was void for want of consideration; and 3. Whether it is discharged by the receipt.

As to the first question, by the common law, the payor of a note may unquestionably bind himself by a note to which his signature is affixed by a third person at his request. The person who thus affixes the signature, is regarded, not so much an agent, as an instrument used by the payor to perform the act by which he binds himself. If this act is performed by a bystander at the request of the payor, the latter certainly is precluded from calling it in question. Haven had no interest in this note, and affixed Hobbs' name to it at his request; and it is impossible to perceive why the fact of Haven's being the nominal payee, should make any difference.

As to the second question, the consideration for this note was the discharge of a prosecution instituted by the sister of the plaintiff against the defendant, under the statute of bastardy, for the support of her bastard child, etc. The court charged the jury, in substance, that if they believed the defendant was the father of the child, the discharge of the prosecution would be a good consideration for the note; and the verdict of the jury is conclusive as to this fact. The only question on this point, therefore, is, whether she had such an interest in that prosecution that she had a right to compromise or discharge it. By the statute, page 366, when any single woman shall be delivered of any bastard child, or shall declare herself to be with child, and that such child is likely to be born a bastard, and shall charge any person in writing, and on oath before any justice of the peace, with being the father of the same, the justice may issue his warrant for the apprehending of the person so charged, may bind him over to the next term of county court, and if the county court shall adjudge such person to be the father, to

charge him "with the payment of money for the assistance of the mother, for her expenses already accrued in the premises, and for the future support of the child." So far the statute considers the prosecution to be exclusively the mother's and for her benefit. But her interest is liable to be defeated by several contingencies. The only one deemed material to be mentioned here, is that which gives the overseers of the poor of the town, likely to be charged with the support of the child, the right to commence the prosecution, or to control and manage the same, when commenced by the mother, if they shall judge the interest of the town to require it. This they are authorized to do on certain terms and conditions prescribed by the statute, on the performance of which, they are to have "all the benefits of this act to which the woman would be entitled." Had the town interfered with the prosecution instituted by the mother, the defendant should have shown it; but of this there is no pretense. And it is therefore regarded by the court as subject to her control.

Third. It is admitted by the case, that the note, though running to the plaintiff, was taken for the sole benefit of the sister, and left in her hands to be paid to her. If the pay was made to the plaintiff, it was in violation of her equitable interest, and contrary to the express understanding of all concerned in the transaction. This court have repeatedly decided to protect equitable interests; nor is there any case known which would require us to give effect to a collusive understanding between the plaintiff and defendant in violation of the rights of a third person.

Judgment of the county court is affirmed.

ARMS v. BURT.

[1 VERMONT, 303.]

A CONVEYANCE TO A MAN, HIS HEIRS, AND ASSIGNS, as long as wood grows and water runs, creates a fee simple.

A WRITING INTENDED AS A RECONVEYANCE, but not sealed or acknowledged, is wholly inoperative.

THE REJECTION OF EVIDENCE OF A BREACH of condition and abandonment of lessee, is erroneous, if offered in connection with proof of re-entry for condition broken.

A LEVY OF AN EXECUTION UPON ALL THE RIGHT, title, and interest of the defendant in and unto a certain tract of land particularly described, is void.

EJECTMENT. General issue pleaded. The plaintiff derived

title under an execution and sale of the premises, issued against Erastus Burt. E. Burt's title was under the defendant, Jonathan Burt, by virtue of an instrument leasing the premises to Erastus, his heirs, and assigns, "as long as wood grows and water runs," upon certain conditions, dated August 9, 1819. The defendant offered evidence to prove breaches of the conditions and an abandonment by Erastus of the premises prior to the sixth of August, 1825, on which day the following entry was made on the margin of the instrument:

"Know all men by these presents, that we, Jonathan Burt and Erastus Burt, parties to this lease hereto annexed, have, and hereby do release, discharge, and exonerate each other from all and every condition, provision, stipulation, or agreement herein or therein contained, and hereby each of us to the other quitclaim all our right, title, interest, or demand in or unto said conditions, provisions, or agreements therein contained, hereby acknowledging each other to be mutually and completely discharged to all intents and purposes. Done this sixth day of August, 1825. Witness our hands: JONATHAN BURT,
ERASTUS BURT."

The sheriff's return upon the levy stated: "I did levy the said writ of execution on all the within named Erastus Burt's right, title, and interest in and unto a certain tract or parcel of land, etc., described as follows," then described the same land set out in the lease.

W. C. Bradley, for the defendant. The lease was terminated by avoidance: Co. Lit. 214, b; Shep. Touch. 151, 153; 3 Co. 64, b; 2 Com. Dig. 352, 8, 6, 95, b; 106, 48, b; Shep. Touch. 154; Co. Lit. 215, a; Com. Dig. 352, tit. Condition. There was not even an equity remaining in the lessee: 5 Wood. Convey. 543; 4 Wood. 245, n; 9 Mod. 113. The levy of the execution was defective: 4 Co. 74; 2 Lev. 121; 8 T. R. 113, 124.

Phelps, contra.

By Court, HUTCHINSON, J. The plaintiff's title, being by virtue of a levy of an execution in his favor against one Erastus Burt, the great questions that arise are, whether Erastus had any title that could pass by levy? And whether this levy is sufficient to vest that title in the plaintiff? The case allowed shows the title to the premises once in Jonathan Burt, the defendant, and, also, that whatever title Erastus Burt had at the time of the levy, he derived from said Jonathan, by virtue of the lease referred to in the case.

Upon the trial, at the county court, the counsel for the defendant rested their defense principally upon the writing signed by said Jonathan and Erastus in the margin of the record of said lease. This was relied upon as a surrender by Erastus of the lease, and all his interest derived from it, to said Jonathan. We are now called to decide the legal effect of that writing. But the nature of the lease must be first understood.

The lease is not a lease for years merely, but conveys a present fee, determinable upon the non-performance, by Erastus, of the conditions and duties named in the lease on his part to be performed. It has the formalities of a deed, signed, sealed, witnessed, and recorded. It runs to him, his heirs, and assigns, and continues so long as "wood grows and water runs." These terms extend as fully beyond the use of land, as the term forever.

But this title was to cease, and the land revert in Jonathan, upon the failure of Erastus to perform the stipulations on his part. Now, what should be the effect, upon this lease, of the writing in the margin of the record, signed by the parties to the lease? It probably is not what was intended by the parties. It is not a conveyance back of the estate, for it has no seals nor acknowledgment. Nor can it be a discharge of the covenants of Erastus, for it contains no consideration. None is pretended but mutuality, and that does not exist. Nothing passes, or is discharged from Erastus to Jonathan, to stand as a consideration for the discharge of Jonathan's claim on the covenants of Erastus. This writing, as it now appears, must be wholly inoperative. It can neither be a surrender nor discharge of the title of Erastus, nor discharge of his covenants. Had it been so executed as to reconvey the estate to Jonathan, that would have formed a good consideration to support the same instrument, as a discharge from Jonathan to Erastus of his covenants.

The case shows that the defendants, on trial, offered to prove a failure of Erastus to perform the conditions of said lease, on his part, before said writing in the margin was executed; and, also, that ever since that time, he has wholly abandoned the premises, and neglected every stipulation of the lease. This was rejected by the court, and probably ought to have been admitted; it certainly ought, if it had been offered in connection with evidence to show that said Jonathan had re-entered upon the premises for a breach of condition. The nature of the lease being as above described, Jonathan was not obliged to re-enter; but might stand aloof and rely upon his remedy upon his cov-

enants against Erastus. Or if he chose to re-enter upon breach of the condition, he might do so, and thereby the estate would revert in him, and Erastus be no longer liable for that support he had covenanted in the lease. And the recovery of Jonathan upon his covenants in such case would only be for the damage he sustained before his re-entry. But it seems Jonathan was in possession before this suit was brought. Probably that might have been urged as a sufficient re-entry to revert the estate.

Now, if such an estate as Erastus had in the premises be liable to levy of execution at all, the plaintiff, by his levy, could gain no better or greater estate than he found in Erastus. That is, a present estate in fee, to hold upon the performance of that multifarious condition; and on failure so to perform, lose the estate wholly by its reverting to said Jonathan.

As the merits of this part of the case have not been tried at all, a new trial must be granted. An objection is now raised to the levy under which the plaintiff claims to have obtained the title of Erastus Burt. This passed *sub silentio* at the trial; but as the case is drawn up, this question is now fairly presented. As a new trial is granted, we are disposed to inform the parties what views the court entertain upon this point also.

Upon recurrence to the levy, we find that the officer did not levy upon the land, but upon the right, title, and interest of Erastus Burt in and unto the land. The land itself is afterwards well described; and the officer returns that the appraisers appraised the premises. Yet the word "premises" must mean what was levied upon, which we find to be Erastus Burt's interest in the land. The levy should have been upon the land itself, and the appraisal should have been of the land itself, subject to such an incumbrance, describing it particularly.

As the levy is, we may ask, What interest had Erastus in the land? What did the sheriff suppose it to be? What did the appraisers suppose it to be? The learned counsel here in court differ much about this interest; and how can it be ascertained how the appraisers viewed it?

In the case of *Elijah Paine v. Lindley Webster et al.*, decided at St. Albans, on the present circuit (1 Vt. 101), a similar question was raised and very fully considered, and the levy considered void. We consider this levy void also.

A new trial is granted.

THOMPSON v. BOARDMAN.

[1 VERMONT, 367.]

A GUARDIAN OF A SPENDTHRIFT has authority, as such, to sell trees standing on his ward's land, and may receive the money, or take notes therefor, payable to himself.

THE WARD CAN NOT, AFTER THE GUARDIANSHIP CEASES, discharge such notes; more especially if the ward is indebted to the guardian for advances made.

IF NONE OF THE TIMBER HAD BEEN TAKEN during the guardianship, and after its termination the ward had refused to allow it to be taken, such facts might constitute a good defense to an action on the note.

ASSUMPSIT on a promissory note. At the time the note was executed Thompson was guardian of one Daniel Hurlburt, and by virtue of his authority as such sold a quantity of pine timber on Hurlburt's land to Amos Boardman, receiving in consideration the notes of Amos and Henry Boardman, payable to himself, one of which was the note in suit. The defense was want of consideration, and discharge of the note by Hurlburt after he was released from his wardship. The plaintiff was permitted to read in evidence, against the defendants' objection, a bill of sale, dated January 19, 1825, of six thousand feet of pine timber standing on Hurlburt's land to Amos in consideration of a sum for which, it was recited, the Boardmans gave their notes to plaintiff. The instrument was signed "Daniel Hurlburt, by his guardian, J. C. Thompson." It was admitted that Hurlburt was released from his wardship on the twelfth of March, 1825.

The defendants, then, gave evidence, against plaintiff's objection, that, in April, 1825, Hurlburt, in consideration of a sum of money received from the Boardmans, executed to them a discharge of the notes given to Thompson, together with a bond of indemnity against any loss they should sustain by reason of Thompson's claim against them on the notes. The discharge recited that the Boardmans, not having cut all the timber to which they were entitled under their contract with Thompson, should be permitted to enter and take what was then due to them. The written release and bond were given in evidence. A deposition was offered in evidence that Thompson told Boardman in May, deponent thought, not to pay Hurlburt the amount of the notes, as the notes were his, Thompson's, property, and that he had made advances to Hurlburt on account, which had not been paid. The deposition was excluded, as was evidence offered by the plaintiff to prove that at the time

the defendants paid the amount of the notes to Hurlburt, he was indebted to the plaintiff in a larger sum.

Verdict by direction for the defendants.

Thompson and Allen, in support of a bill of exceptions, on behalf of plaintiff.

Adams and Bailey, contra.

By Court, PRENTISS, J. The statute, prescribing the powers and duties of a guardian of a spendthrift, authorizes and empowers the guardian to take into his possession all the lands, goods, chattels, rights, and credits of the ward, and the same to dispose of and manage to the best advantage of the ward and his heirs; provided, that he shall not sell and convey the lands of the ward without the order and permission of the supreme court. And if any person shall detain or withhold the lands, goods, chattels, rights, or credits of the ward, the guardian may demand and recover the same by due course of law; and out of the estate he is to pay the just debts of the ward, who is rendered incompetent to make any bargain or contract whatever: Comp. Stat. p. 374, secs. 14, 15.

By the statute, the guardian of a spendthrift is entitled to the possession both of the personal and real estate of the ward, for the support of the ward and the payment of his debts; and by the general nature of his trust he is vested with an authority certainly not less extensive than that of a guardian of an infant at common law. In the latter case, the guardian is held to have such an interest in the ward's estate as enables him to lease it, to avow for *damage feasant*, and to bring trespass or ejectment in his own name: *Shopland v. Royle*, Cro. Jac. 98;¹ *Wade v. Baker*, Ld. Raym. 130; *Eyre v. Countess of Shaftsbury*, 2 P. Wms. 103; *Byrne v. Van Hoesen*, 5 Johns. Rep. 67. In *The King v. The Inhabitants of Oakley*, 10 East, 491, Lord Ellenborough said that a guardian in socage had not a mere office or authority, but an interest in the ward's estate, and was entitled to the possession of the property. And in *The People v. Byron*, 3 Johns. Cas. 53, it was held that the guardianship of an infant, under an appointment from chancery, created not merely a naked power, but a power coupled with an interest; that although the guardian had no beneficial interest in the property, yet he had the dominion of it *pro tempore*, and possessed the same authority over it as an administrator has over the estate committed to his charge.

1. *Shopland v. Royle*, Cro. Jac. 98.

As the statute gives the guardian of a spendthrift the possession and disposition of the ward's estate, and enables him to demand and recover the same by due course of law, it would seem quite clear that he has not a bare office merely, but is vested with an authority coupled with an interest. The nature of the guardian's authority over the estate committed to his charge must, we think, involve the right, to some extent at least, to cut timber standing and growing upon the land of the ward. Although timber so situate is to be regarded as part of the real estate, yet the right, in the case of guardians and trustees, appears to be well established: *Case of the Marquis of Anandale*, 2 Ves. 381; *Inwood v. Twyne*, Amb. 417. By the statute, 17 Ed. II., the lands and tenements of lunatics are to be kept without waste, and in no wise to be aliened. Although, under this statute, timber on the land is considered as part of the real estate; yet in *Ex parte Ludlow*, 2 Atk. 417,¹ Lord Hardwicke was of opinion that committees of lunatics might exercise the same power as to cutting it for repairing the estate as any other discreet person who was owner; and in *Oxenden v. Lord Compton*, 2 Ves. 69,² the lord chancellor observed that there were cases in which to cut timber upon the estate of a lunatic would be no waste; as if it were wanted for his sustenance, or it had been sold to be used for his support. Indeed, it seems to be settled that timber may be cut where the maintenance of the lunatic, the payment of debts, or the interest of the lunatic requires it: *Ex parte Bromfield*, 1 Ves. jun. 453. If the guardian of a spendthrift has authority to cut timber, not only for necessary repairs, or to clear the land for cultivation, but also for the support of the ward or the payment of his debts, without being guilty of waste, as appears to be the doctrine of analogous cases, it would seem difficult to draw into question the power of the guardian in this respect, or to limit or restrict the exercise of it, otherwise than on an application to a court of chancery. But it is to be observed that the timber which was licensed to be cut in the present case was contracted and sold to Amos Boardman, the principal, by Hurlburt himself previous to his being put under guardianship. In place of that contract, a new contract by the plaintiff, after his appointment as guardian, was substituted, taking the note in question, and one other note, for the price of the timber, and discharging Boardman from his liability on the old contract. The transaction on the part of the plaintiff, therefore, was in

1. 2 Atk. 407.

2. 2 Ves. jun. 69.

fact a mere renewal by him in his capacity of guardian of the contract previously made by Hurlburt. But whether the contract is considered in this light, or as an original sale of the timber by the plaintiff, there does not appear to be any excess of authority on his part; and he was undoubtedly competent, either to receive the money in satisfaction for the timber, or to take notes for the agreed price. He took the defendant's notes for the price of the timber, as he was legally authorized to do, and there can be no question but that there was a sufficient consideration for the notes.

It can not be pretended that the discharge of the guardianship annulled, vacated, or in any way invalidated any of the acts performed by the plaintiff within the scope of his powers while guardian; and the notes being founded on a sufficient consideration, and binding in their creation, the subsequent discharge of the guardianship can not affect their validity. When a guardian makes a contract, as such, he binds himself and not the ward, and an action upon the contract must be brought against the guardian. It is held that the guardian of an insane person can not make his ward liable to an action, as on his own contract, by any promise which the guardian can make; and if he gives a note for the debt of his ward, describing himself as guardian, he will be personally liable, although the guardianship be discharged: *Thatcher v. Dinsmore*, 5 Mass. 299.¹ The plaintiff, as we have already seen, had not a bare office or agency merely, but an authority coupled with an interest; and the contract with respect to the timber was in law as well as in fact a contract between the plaintiff and Boardman, and not between Hurlburt and Boardman. If the beneficial interest in the contract was in Hurlburt, yet the legal interest was in the plaintiff, and the notes were executed to him, and vested a legal right of action in him. If Hurlburt, then, after the discharge of the guardianship, could be permitted to receive payment and discharge the notes, it could only be upon the ground that the notes were taken by the plaintiff in trust for him, and he was equitably entitled to the money due upon them. But he could have no equitable right to the money, if there was a balance due to the plaintiff for advances. This, it appears, the plaintiff offered to show; and the testimony, if it had been admitted, would have been a full answer to all right claimed by Hurlburt, in equity, to receive the money upon the notes, and clearly shown that the payment of it to him, by the de-

1. *Thatcher v. Dinsmore*, 5 Mass. 299 [4 Am. Dec. 61].

fendants, could not be justified on that ground. Indeed, if it were to be considered that the plaintiff was vested with a bare office merely, giving him a naked authority only, it would be certainly just, on the facts offered to be proved by him, to allow him to enforce payment of the notes. He offered to prove that he had made advances to a greater amount than the notes, and had passed the notes in account to Hurlburt, of which the defendants had notice before they made payment to Hurlburt.

On these facts, we think that the plaintiff, in any view of the case, would have a right to the money due upon the notes, and that the payment to Hurlburt, after the notice given, could not avail the defendants. It is not necessary, nor do we intend to say, that a guardian, after the termination of the guardianship, has a lien for his disbursements upon the unappropriated goods of the ward. In *Norton v. Strong*, 1 Conn. 65, it was determined, contrary, however, to the opinions of Reeve, C. J., and Baldwin, J., that on the termination of the guardianship by the death of the ward, the whole of his personal estate vested in his executor, and the guardian had no lien upon it for disbursements made in the life-time of the ward. Admitting this decision to be right, it does not touch the question, whether a guardian who has taken security to himself for goods sold, or a debt due the ward, having a balance due him, and giving notice of the same, has not a right to the money, notwithstanding his office has ceased, which can not be defeated by payment to the ward or his representative. It is the duty of the guardian not only to provide for the support of the ward and his family, but out of his estate to pay his just debts; and if the guardian has made advances for these purposes, as it may be often necessary for him to do, to prevent a sacrifice of the ward's estate, it would not be consistent with justice, that in the event of his being discharged, or his guardianship ceasing by the death of the ward, the ward in the one case, or his representative in the other, should be entitled to receive payment upon all securities taken by the guardian, and which he has appropriated to himself as a fund, and the only one, perhaps, he has, out of which to reimburse his advances.

It does not distinctly appear from the statement of the evidence offered by the plaintiff, whether the advances were made by him before or after the notes in question were taken. If the advances were made after, and on the credit of the notes, the case would be still stronger for the plaintiff. Although the mere passing the notes in account to Hurlburt would not be equiva-

lent to a payment over to him, or bind him to account for the amount at all events, yet, if the plaintiff was led to make advances in consequence of the notes, he ought to be allowed to enforce payment of them, notwithstanding the guardianship is discharged; but in the view we have taken of the subject, it is immaterial whether the advances were made before or after the notes were taken. In either case, the plaintiff, on the facts offered to be proved by him, would be entitled to recover the money due upon them.

If none of the timber, for which the notes were given, had been received before the guardianship was discharged, and Hurlburt had refused to permit it to be taken on the contract, it might be a good defense to the action, on the ground that the consideration of the notes had failed. But it appears that the principal part of the timber was taken before the guardianship was discharged, and the part not taken could only be a defense *pro tanto*.

Judgment reversed, and cause remanded to the county court for a new trial.

POWERS OF GUARDIANS IN CHANCERY AT THE COMMON LAW over the property of their wards. The origin of the power of the chancellor to appoint guardians of infants, has been the source of much interesting discussion by learned English jurists. Hargrave, not questioning the legality of the exercise of this jurisdiction, at the time in which he wrote, yet urged, from the absence of early precedents, that it was "a usurpation for which the best excuse was that the case was not otherwise sufficiently provided for." On the other hand, Fonblanque, 2 Tr. Eq., b. 2, pt. 2, c. 2, sec. 1, note (a), with much spirit and ability maintained that the superintendence and protective jurisdiction of the court in the case of infants, was a delegation of the duty of the crown as *parens patriæ*. This position taken by Fonblanque is regarded as the correct view of the origin and nature of the jurisdiction, by Lord Thurlow: *Powell v. Cleaver*, 2 Bro. C. C. 499; by Lord Hardwicke: *Butler v. Frieman*, Ambl. 301; and by Lord Eldon: *De Manneville v. De Manneville*, 10 Ves. 52; and is now generally adopted: 1 Spence's Chancery Jurisdiction, 611, 620; Adams on Equity, sec. 281; Story's Eq. Jur., sec. 1333, where the conflicting opinions, together with the arguments urged in their support, and the authority cited, are collated. And this last writer concludes, sec. 1337: "But whatever may be the true origin of the jurisdiction of the court of chancery over the persons and property of infants, it is now conceived, on all sides, to be firmly established, and beyond the reach of controversy. Indeed, it is a settled maxim, that the king is the universal guardian to infants, and ought, in the court of chancery, to take care of their fortunes."

The mode of calling the jurisdiction into operation is by filing a bill to which the infant is a party: Adams' Equity, sec. 281. The infant then becomes a ward of the court. In section 104 of Macpherson on Infants, it is laid down: "Mr. Hargrave has stated that the first case to be found of a guardian appointed by the chancellor on petition, without bill, was in 1696,

in the case of *Hampden*, and the practice is now fully established. The present writer is not aware of any instance of the appointment of a guardian by the court of exchequer, on petition without suit." The possession of property is not essential to the existence of the authority of a court of chancery to appoint a guardian, though the want of it may create a practical difficulty in its exercise, by incapacitating the court for providing for the infant's maintenance: *Adams' Eq.*, sec. 281. But *Macpherson on Infants*, sec. 105, not denying that the court in such a case would have authority, says, that there being no interest to protect, and no object which the court can take notice of, no guardian will be appointed. The same author further states, that where a suit is pending, a guardian of the person only is appointed, the estate being under the direction of the court; and that where no suit is pending, the guardian is appointed for the person and estate.

The chancery guardian continues until the majority of the infant, and is not controlled by the election of the infant when he arrives at the age of fourteen: 2 *Kent's Com.* 227. His powers, his rights and duties, with respect to the person of the infant, whether the appointment was pending a suit or not, are the same as those of other guardians: *Macpherson on Infants*, sec. 105. But some difficulty exists in determinating with precision the extent of the authority possessed by the guardian of the infant's estate, appointed by a court of chancery: 2 *Daniell's Ch. Pl.* sec. 1363. Judge Kent, in *People v. Byron*, 3 *Johns. Cas.* 59, referred to chancery guardians as being the substitute of guardians in socage; and in the same case, Judge Radcliff observed, 56, "I see no difference between testamentary guardians and guardians by chancery appointment. In either case such guardian has a vested interest in the estate of his ward. He may bring actions relative thereto, and make avowry in his own name, and may also make leases during the minority of the infant. He has, in all respects, the dominion *pro tempore* of the infant's estate, and possesses more than a naked authority." If this understanding of the powers of a guardian in chancery is correct, the extent of those powers could be ascertained by an examination of 12 *Car. II.*, c. 24, under which testamentary guardians were created, and which, according to Judge Radcliff's idea, must be considered as declaratory of the common law authority conferred upon a guardian appointed by the chancellor. That this authority over the estate of the ward was quite extensive may be inferred from the fact that it was customary to compel the guardian to enter into a recognizance to account for the property of the ward placed under his care, in the same manner as a receiver: 2 *Daniell's Ch. P.*, sec. 1354. The recognizances have been stated to extend to the whole amount of the capital of the infant's personal estate, and two years' income of his real estate, if any: *Macpherson on Infants*, sec. 108. But that there is a difference between testamentary guardians and those appointed by the court appears from *Bradshaw v. Bradshaw*, 1 *Russ.* 528; and in respect to the very question of survivorship, concerning which the New York court, in *People v. Byron*, *supra*, held that there was no difference.

In a note to *Sharswood's Blackstone*, 1 *Com.*, sec. 462, the following general summary of the powers of the guardian under consideration is given. "A ward in chancery is in all cases under the special protection of the court; for no act can be done affecting the minor's person, property, or estate, unless under its express or implied direction, every act done without such direction being considered a contempt exposing the offender to be attached and imprisoned. Thus, it is a contempt to conceal or withdraw the person of the infant from the proper custody, or to disobey any order of the court relative

to its maintenance or education, or to marry the infant without the approbation of the court. For the court, in approving a person to be guardian, usually gives him express direction how to exercise the powers which it has conferred; prescribes the residence, and settles a scheme for the education of the infant, and regulates, if necessary, his choice of a profession or trade; approves or prohibits the minor's marriage, and performs all the other duties of guardians by nature or for nurture. With respect to the property of the ward, the court not only superintends its management during the owner's minority, but directs a proper settlement on the marriage of its ward; and this protection is not always removed upon the minor's attaining twenty-one, but is, for some purposes, continued afterwards, especially with regard to the marriage of female wards. In these and other respects, therefore, guardians appointed by the court of chancery have extensive delegated powers—this species of guardianship being one far more capable of adaptation to the various requirements of modern society, the intentions of testators, the wants and wishes of the infants themselves, and the different kind of property which may call for administrative care, than all or any of the other guardianships known to the law."

BURLINGTON v. CALAIS.

[1 VERMONT, 385.]

DECLARATIONS OF THE OVERSEER OF THE POOR and agent of a town, made while executing his agency, are admissible against the town.

A YEAR'S SETTLEMENT, under the act of 1797, does not require that the pauper should be constantly with his family, provided their place of abode is his domicile.

"COMING AND RESIDING WITHIN THE STATE," within the meaning of the act, does not require a coming from another state, but a coming from any place to the town, or being and residing there when the act was passed, is sufficient.

ASSUMPSIT to recover the expenditures of the plaintiffs in support of one Salmon Davis, under the settlement act. The facts appear from the opinion. The cause came before this court on exceptions taken by the defendant to the charge of the court to the jury.

Griswold, in support of the defendant's right to a new trial, relied upon: Stat. March, 1787; Id. 1797; Rev. Laws, 369; Stat of Nov. 1801, ed. of 1808, 400; Jacob's Law Dict., title Poor, 218 to 233; *Billerica v. Chelmsford*, 10 Mass. 394; *Cambridge v. Charlestown*, 13 Id. 501; *Boston v. Wells*, 14 Id. 384; *Dallon v. Hinsdale*, 6 Id. 501.

J. C. Thompson, contra.

By Court, HUTCHINSON, J., first concisely stating the case. The points now in dispute are reduced to a narrow compass. Supposing the plaintiffs to have a just claim upon the defend-

ants for the support of Davis, the pauper, while confined in the common jail in Burlington, have they shown a proper notice of their claim before the commencement of this action? About this there is no dispute, if the testimony offered by the plaintiffs to that point was legally admissible. It seems that a letter was sent by the mail to the overseers of the poor of Calais, containing the proper notice of the expenditures, and requesting payment. And, to prove that this letter was received, the plaintiffs offered, and the court admitted proof, that at the trial of this cause before the magistrate, a Mr. Wheeler, one of the overseers of the poor of said Calais, and the acting agent to defend this suit, acknowledged that he had duly received the letter; that he fully acknowledged this while attending the justice court, during and immediately after the hearing of the cause.

It is objected that this testimony was not admissible. The doctrine is well settled that the sayings of an agent, while executing his agency, form a part of the *res gestæ*, and may be proved against his principal; but the *after* confessions of such agent about the facts of the case, may not be thus proved, but the party wanting the proof must call the agent himself, or other witnesses to what actually transpired at the time. In 1 Camp. R. 140, *Young et al. v. Wright*, cited in Peake, 36, it is said what an attorney admits on the record to obviate the necessity of proving it, binds his client, for he will be presumed authorized. The acknowledgment in the present case, though not made of record, was made to obviate the necessity of proof, and that at the time and place of trial, and while Wheeler was executing his agency as overseer of the poor in defending the same suit, preparatory to which the letter was sent. It is urged, however, that Wheeler might have been called as a witness by the plaintiffs. So may any one, who acts merely as agent, be called at any time to prove what transpired connected with his agency. Wheeler, though an inhabitant of Calais, is made a competent witness by statute, and could not refuse to testify if called by the plaintiffs; yet it would be going too far to compel the plaintiffs to bring him to court and use him as a witness when he, in the execution of his agency, has furnished such testimony as that adduced in the present case.

This exception is overruled.

We proceed to inquire whether the charge of the court was correct with regard to the residence of said Davis, and his gaining a settlement after the statute of 1797 came in force. The

testimony was, that he left his family in the log house in Calais, where he had formerly lived before he moved to Waterbury, and went to the eastward with a view of finding a place to which he could remove his family; that he visited his family several times; was not from them a full year at any one time; that he found no place to which he concluded to move his family till the year 1801; that during all that time he intended living in Calais, unless he found a place that suited him somewhere else. In all this there is no making of any rest at any one place without a view of settling there. Where his family was must have been his domicile, or he had none. This is not like the case of Raymond, cited from Mass. Rep. He left his family in Vermont and took up his residence in Massachusetts, with a view to move his family there as soon as convenient. Nor is it like the case of Billerica and Chelmsford, where the pauper actually moved his family with a view to settle and never return, but moved back after three months. Davis' domicile being in Calais from the time the statute of 1797 came into operation until the latter part of September, 1801, when he moved with his family to the then province of Maine, we think this such a residence as would gain a legal settlement in Calais.

But the defendants insist that as Davis, when he last moved to Calais, had not newly come into the state, but moved from Waterbury, another town within the state, a year's residence would not give him a settlement. The first section of this statute (see page 369) describes the various ways in which a person may gain a settlement in any town: 1. The purchasing, paying for, and occupying for a full year, a freehold estate of the value of one hundred dollars; 2. Renting a tenement, and occupying two years, and paying a rent of twenty dollars, or upwards; 3. Living in town, and executing a public office one whole year; 4. Having paid his share of the public rates or taxes for the space of two years; 5. Having been bound, and served as an apprentice not less than three years before coming of age. It then adds, sixthly: "And every other healthy, able-bodied person coming and residing within this state, and being of peaceable behavior, shall be deemed and adjudged to be legally settled in the town or place in which he or she shall have first resided for the space of one whole year." It is contended that this last provision extends only to persons newly coming into the state. And this idea is enforced by the argument that upon any other construction it would render some of the former provisions useless. This argument is not without weight, yet we are un-

willing to believe the legislature, at so late a period as the year 1797, would designedly make such a provision for the mere purpose of encouraging emigration, especially where it could have no such effect whatever. Every person moving from without the state into any town within the state, has a legal settlement in such town forthwith, so far as relates to the liability of such town to furnish their support; that is, if they are in want the town must maintain them, and can not remove them to the place whence they came, it being out of the state, nor to any other town in the state, because they have no residence there.

We can not, therefore, presume that the legislature would make such a provision for an object that would not be effected by it. This last provision might have been introduced as an amendment to the former parts of the section, without a full consideration how far it might absorb the former provisions. Yet even this may not be so; for the former provisions have no regard to the question of good or ill health, nor to the question whether a person should be able-bodied when coming into any town to reside. Hence, the legislature may have intended to make health and strength of body as good a qualification for a settlement as a certain amount of property, used in a prescribed manner. Furthermore, the provisions about towns, in that statute, all relate to towns within this state; towns over which the laws might have effect; and between the rights of which courts might adjudicate and give effect to their decisions.

That statute looks forward exclusively. It makes provision for the future gaining of a settlement. The expression, "coming and residing in the state," is indefinite, and must be inoperative till we pass on to the expression of the place within the state; that is, the town in which there is first a residing a full year. That may alike mean, the first after the act comes in force, or first of their residing in any town. This probably ought to be construed according to its spirit and meaning. As applied to those who should afterwards change their residence, it means the town into which they remove. As applied to the inhabitants that were stationed when the act passed, their remaining where they were, and being healthy and able-bodied, brings them within the act. It is not to be presumed that the legislature intended to repeal all former modes of gaining a settlement, and not make provision for those inhabitants that had not yet gained a legal settlement, though they had become stationed for life. Nearly the same expression is used in the warning-out statute, and by one mode of construing that might

only refer to such as should, after the passing of the act, change their residence. But the supreme court have put a construction upon that statute. They have decided that persons residing in any town when the act passed, and who continued to reside there a full year, without being warned out, gained a settlement. Their being and residing is tantamount to their coming and residing. That extends the provisions of the statute to all who had not gained a settlement before the act passed. A settlement would be prevented by a warning; and would be gained if the warning was neglected. That decision fully supports the construction we have now given to the statute of 1797.

Upon the whole view of the case, we approve the instructions given to the jury on the trial, and the judgment of the county court is affirmed.

BABCOCK v. KENNEDY.

[1 VERMONT, 457.]

MORTGAGEE'S RIGHT TO RENT.—Where the time in which the debt secured by a mortgage has passed without payment, the mortgagee, after notice to the tenant, is entitled to recover the rents and profits.

THE TENANT CAN NOT RECOVER OF THE MORTGAGEE, in such case, the value of articles delivered to, and received by, him for the rent. Nor will the failure of the mortgagee to recover rent in an action against this tenant therefor deprive him of his defense to the action.

ACTION on book account referred to an auditor. The auditor reported that W. Kennedy, the defendant, was the mortgagee of certain premises whereof the plaintiff was tenant under the mortgagor. After the day of payment had passed without payment, the defendant notified the plaintiff to pay the rent thereafter to him. And the defendant made repairs upon the premises, and received the articles charged in this action. The defendant supposed that he was receiving the articles in payment of the rent, and the plaintiff declared that they should be taken as for the rent, provided he was not responsible to the mortgagor. The auditor also reported that an action brought by the defendant against the plaintiff for the rent had terminated in favor of the tenant by an award of arbitrators.

Richardson, Aldis, and Davis, for the defendant, urged that he was a mortgagee in possession, and liable to the mortgagor for the rent, and therefore entitled to the same as against the tenant: *Moss v. Gallimore*, 1 Doug. 278; *Birch v. Wright*, 1 T. R. 378. That the articles sued for were voluntarily delivered to

the defendant after the plaintiff knew he should pay the rent to the defendant, and, therefore, could not be recovered back: 2 Com. on Con. 40; *Taylor v. Hare*, 4 Bos. & P. 260; *Slason v. Davis*, 1 Atk. 73.

Smalley and Adams, for plaintiff. The tenant of the mortgagor was in possession: *Thunder v. Belcher*, 3 East, 450. And no case can be found which sustains the mortgagee's right to recover the rent of the mortgagor under such circumstances: *Keech v. Hall*, 1 Doug. 21; *Wilder v. Houghton*, 1 Pick. 87; *Barkhamstead v. Farmington*, 2 Conn. 600; *Rex v. Michael*, Doug. 631. The award of the arbitrators settles the question between the parties: *Cald. on Arbitration*, 51; *Chase v. Wetmore*, 13 East, 357.

By Court, HUTCHINSON, J. (After stating the case.) The only ground on which the plaintiff can recover the sum claimed of the defendant is that he is liable to pay the rent in question to Thomas Kennedy, the mortgagor; for the report of the auditor shows that the articles were delivered in contemplation that they would go in payment of the rent, supposing the defendant, as mortgagee, entitled to receive such rent. If the plaintiff is compellable to pay this rent to the mortgagor, the consideration upon which he delivered the articles to the defendant has failed, and he ought to recover back their value; if otherwise, the same must go in payment of the rent, according to the original understanding between the plaintiff and defendant.

The statute allowing the defendant in an action of ejectment to come in with a motion for a decree of redemption, only admits that motion after a judgment for the plaintiff in common form; and the common form, as dictated by other statutory provisions, is for the plaintiff to recover his damages and costs. Another statute provides that the mortgagor shall have a right to keep possession of the mortgaged premises till condition broken, in all cases except where a contrary provision is contained in the mortgage deed. As soon as there is a breach of the condition by non-payment, the mortgagee has a right to the possession of the mortgaged premises; and having such right, if he sues and recovers, his judgment in common form, according to his legal rights, would be that he recover his damages and cost, computing the rents and profits from the breach of the condition. If a motion to redeem is then interposed these damages will form no part of the sum due in equity, but that will be composed of the money secured by the mortgage and its in-

terest, just as though these damages had not been recovered. But if there be no redemption in fact, execution will issue for these damages and the taxable costs. The effect, therefore, of this recovery of damages is only to enforce actual redemption; for, if such damages are recovered and collected without any decree of foreclosure, the mortgagee must account for the same as part payment of the mortgage-money whenever the mortgagor brings his bill to redeem. As between the mortgagee and the original mortgagor this recovery of damages would be of but little use, for the mortgagee might usually as well pursue his mortgage securities. It is considered in Massachusetts that the mortgagee's suffering the mortgagor to remain in possession amounts to a consent to receive nothing as rent but the interest of the money; and the courts there allow the mortgagee no rents and profits.

The reasoning can not be the same when the assignee of the mortgagor takes possession and converts the profits to his own use; for the mortgagee has no remedy against such assignee for the accruing interest upon the mortgage-money; and if he is enriched by the rents and profits of the mortgaged premises, he holds the same out of the reach of the mortgagee, his only remedy being upon the mortgagor and upon the mortgaged premises. It would, therefore, seem reasonable, if the law will admit of it, that the mortgagee should recover the rents and profits of such assignee, and thereby render a redemption more certain, and he be liable to account for the same when redemption is made. This court decided in a case in Caledonia county, *Atkinson v. Burt*, 1 Aik. Rep. 329, that the mortgagee might recover rents and profits against the assignee of the mortgagor after notice to quit, and if no such notice, then from the commencement of the action.

In the present case the defendant's calling upon plaintiff, after a breach of condition, and giving him notice to pay the rent to the defendant, was, for this purpose, tantamount to notice to quit; and from that time forward he had a right to receive the rents and profits, from the principles of the decision above cited. And during the same period the mortgagor could support no claim for the rents and profits, for the very reason that the same belonged to the defendant.

It appears from the report of the auditor that the defendant, the mortgagee, was in possession of the other parts of the mortgaged premises; but it does not appear that the plaintiff had so attorned to the defendant as to render his possession, properly

speaking, that of the defendant. The plaintiff seems to have declined attorning to the defendant through fear of his liability to the mortgagor. Yet, after the pay-day of the mortgage-money had arrived, and the payment not made, and he notified by the defendant to pay him the rent, if he paid it to Thomas Kennedy, the mortgagor, he would have done so at the peril of paying the same again to the defendant, the mortgagee. So far as regards this part of the defense, the facts reported by the auditor entitle the defendant to judgment for his costs.

We will now notice the arbitrament and award. If this forms any answer to the defense set up, it must be on the ground that the defendant is thereby estopped to set up his right to this rent, or his claim thereto is barred, as if there had been a regular adjudication and decision against his right. It appears by the report that the defendant brought against the plaintiff an action of assumpsit for the use and occupation of these premises. That action was submitted to and decided upon by arbitrators, and the award was against the present defendant, that he could not recover in the action. It does not appear on what ground they arrived at that decision; but, if there is any ground on which they might so decide, and yet this defense stand good, the estoppel or bar fails. Now it is obvious that action might have been decided upon the ground of a total want of contract between plaintiff and defendant. The arbitrators might have found the defendant in that action a trespasser upon, and not tenant to, the then plaintiff, who is the present defendant. What is more conclusive, they might have decided on the very ground, that the items of the plaintiff's account, now sued for, were a full payment of the very rent then sued for.

In such a case their decision would have been correct, and would also furnish a good reason why the present plaintiff should not recover in this suit, and get back the very money that once went in payment of the rent. In every view taken by this court, the judgment for the plaintiff is erroneous, and must be reversed. And it also appearing by the report of the auditor that, if the plaintiff's account was applied in payment of the rent, there would be nothing due to the plaintiff, judgment must be rendered for the defendant to recover his cost; which is the judgment the county court ought to have rendered.

MOONEY v. MAYNARD.

[1 VERMONT, 470.]

ONE CAN NOT IMPOUND NEAT CATTLE taken *damage feasant* in his inclosure unless the fence he was bound to repair was such as the law required. THE STATUTES UPON THIS SUBJECT must have been intended to supersede the common law.

REPLEVIN. Avowry, justifying the impounding the steers damage feasant on the defendant's farm. Plea, that the steers escaped from a common, against the plaintiff's will, upon the land of the defendant, through a defect in the fence which the defendant should have kept in repair.

Verdict for the plaintiff. The defendant took exceptions to the charge to the jury, and the cause was removed to this court on a motion for a new trial.

Smith, in the support of the motion, who receives damage from the trespassing, may, without regard to the condition of his fences, either distrain or bring an action of trespass: 5 Bac. Abr. 179; *Rust v. Low*, 6 Mass. 90. The statutes of this state do not repeal or affect the remedies given by the common law: Stat. p. 450, sec. 3.

Smalley and Adams, contra. The statutes of this state are wholly inconsistent with and repugnant to the common law on this subject. An owner of land can not distrain neat cattle, unless they are taken on lands inclosed by a legal fence as defined by the statute relating to fences and fence-viewers: Stat. sec. 1, p. 446.

By Court, HUTCHINSON, J. This case has lain with the court for consideration these two years. Some difficulties have arisen from the shape in which the questions are presented in the bill of exceptions, and some from the importance of giving a right construction to the statute, which contains provisions inconsistent with the common law. Two members of the court, not with us at the first argument, have heard the arguments of this term, and we have arrived at a decision in the cause.

It seems that fences by the sides of four roads that cross each other at right angles, inclose a large tract of land, owned by different people; in the center of which is a large piece of woods, surrounded by the back fences of the several farms, into which, as a large common, the several owners turned their cattle in times of drought and scarcity of feed. That the defendant's farm lay east of this wood, and the plaintiff's farm lay

west of it. The plaintiff, at the west end of the woods, has a clearing of twenty acres used as a pasture, and not separated by any fence from the piece of woods. The defendant, and those under whom he claims, have supported the fence all the way up on the west side of his inclosure, and adjoining the woods, for twenty years. This fence was out of repair, and the plaintiff's steers went from said pasture through the woods into the inclosure of the defendant, and did damage. The defendant impounded them, and the plaintiff has brought his writ of replevin. The defendant has avowed the taking, and justifies on the ground that the steers were doing damage. The plaintiff replies that his steers were feeding in his said pasture, and escaped against his will, etc., and went into the defendant's said inclosure, through the defect of the fence which it was the duty of the defendant to repair. This was traversed.

The exceptions, upon which the case was brought up to this court, were so inattentively drawn, that neither the testimony referred to, nor the charge of the court, seems very nearly allied to the issue, at least in some parts thereof. The judge is made to charge as if deciding the weight of evidence when instructing the jury upon the liability of the plaintiff to maintain half of the fence through which the steers passed to do the damage complained of. But as the instructions upon that point were in favor of the defendant, and the plaintiff obtained a verdict, the defendant is not now at liberty to complain of those instructions.

The only part of the instructions to the jury, which would authorize a verdict for the plaintiff, was that which decided that the plaintiff was entitled to notice from the defendant to make his half of the fence, before his cattle were liable to be distrained damage feasant. This the court consider correct. More than this might have been correct. The jury might have been left at liberty to find the defendant liable by the analogy of prescription, to maintain the whole fence, if they believed that the defendant, and those under whom he claimed, had upheld the same fence for twenty years, as stated in the testimony. But, surely, after so long a support of the fence without charge to the plaintiff, he must not have his cattle impounded before he has notice of a claim that he should make one half of the fence. This we may say with confidence, if the provisions of our statute are to govern.

But the defendant contends that the statute provisions are not repugnant to the common law, but are cumulative remedies, and

in affirmance of the common law; and a case is cited from 6 Mass. 90, *Burt v. Low et al.*,¹ which shows that the court in that state consider the common law in full force, notwithstanding their statute. Should we follow that decision, it would effect a great and important change in the concerns of keeping cattle. The cattle of many persons, especially the cows of poor persons, in all parts of the state, have always been permitted to run upon the highways and commons; no man presuming to take them up damage feasant, unless his own fences would stand the test of the law. And this practice is well warranted by our statute, the provisions of which are so various and extensive, and form such an entire system upon the subject, it must have been intended to supersede the common law.

We must not be understood to mean, that a man who might distrain and impound, might not, instead thereof, commence his action at common law. But we do mean, that a man who could not lawfully distrain and impound, by reason of the defect of the fences, which he ought to keep in repair, can not maintain an action at common law for the same injury; nor can a man distrain, as at common law, unless his part, at least, of the fences, is in such repair as the law requires.

These provisions of the statute are particularly noticed in the argument of the plaintiff's counsel, and need not be repeated by the court.

The judgment of the county court is affirmed.

GOODRICH v. HATHAWAY.

[1 VERMONT, 485.]

POSSESSION TO MAINTAIN TRESPASS.—One who has bought the timber on a lot belonging to another, and enters and cuts a portion, has sufficient possession to maintain trespass against a stranger, who should cut and carry away some of the timber.

AN APPEAL LIES IN SUCH CASE, although the damages claimed do not exceed ten dollars.

TRESPASS brought before a justice of the peace, demanding damages in ten dollars. The declaration contained three counts: two for cutting and carrying away certain pine trees, and the third for taking and carrying away five pine saw-mill logs, the property of, and in the possession of, the plaintiffs. The facts are reviewed in the opinion. The court charged the jury that the plaintiff, not having the possession of the land, could

1. *Burt v. Low*, 6 Mass. 90.

not maintain his action. The plaintiff excepted, and moved for a new trial.

Fisk and Soule, for the plaintiffs.

Richardson and Sheldon, contra.

By Court, HUTCHINSON, J. It appears, by the case, that one Samuel Hawkins, owning a piece of land, sold to the plaintiffs about twenty thousand feet, board measure, of the standing pine timber, including one large pine tree; and then sold the land to William Hawkins, reserving the timber sold to the plaintiffs, as aforesaid. The plaintiffs then purchased of said William Hawkins the residue of the pine timber on said lot; and the defendant cut and carried away the large pine tree. Prior to this, the plaintiffs had entered, and cut and carried away a part of the timber they had thus bought of said Samuel and William.

The court instructed the jury, that this showing did not place plaintiffs sufficiently in possession to enable them to maintain trespass upon the freehold. We consider this instruction incorrect. The plaintiffs, having made the two purchases of timber, and gone on to the land and cut a part, had as much the possession of the land, for the purpose of getting off this timber for their own use, within the time agreed, or within a reasonable time, as if they had owned the land.

Though William Hawkins told the defendant he apprehended no difficulty in his cutting the pine tree, he also told him it belonged to the plaintiffs, and that he had himself no right to it; and also told the defendant, before he took the whole, that the plaintiffs said he must not remove the same. The owner of the land sets up no claim, and the defendant is a stranger to the title. This virtually decides the question of jurisdiction.

The action is properly an action of trespass upon the freehold. The plaintiffs having recovered upon the third count only, makes no difference about the appeal, which brings up the whole action. Further, though trover might have lain for the logs that were cut, so will trespass also, and trespass upon the freehold. The appeal is expressly given by the statute, which gives jurisdiction of such actions to a justice of the peace. The decision of the county court sustaining the appeal was correct but for the errors in their charge to the jury.

The judgment is reversed, and a new trial granted.

CASES
IN THE
COURT OF APPEALS
OF
VIRGINIA.

GLASSCOCK v. BATTON.

[6 RANDOLPH, 78.]

POSSESSION RETAINED BY A MORTGAGOR UNDER A RECORDED MORTGAGE of chattels, does not render it fraudulent nor void.

ABSOLUTE BILL OF SALE BY A MORTGAGOR TO THE MORTGAGEE of the mortgaged property releases the mortgage, and if not recorded, and the bargainor retains possession, such bill of sale is void as to creditors and subsequent purchasers.

SUBSEQUENT PURCHASER MAY COME INTO EQUITY for relief where the bargainee in such prior bill of sale releasing a recorded mortgage has obtained possession of the mortgaged property.

TEMPORARY RETENTION OF POSSESSION by the vendor does not render a conveyance void as against subsequent purchasers, if possession is delivered before any one is deceived or has become a purchaser.

RETENTION OF POSSESSION UNDER A SUBSEQUENT CONVEYANCE for value does not make good, as against the vendee, a prior conveyance fraudulent and void as to such vendee.

APPEAL from the Clarksburg chancery court. The complainant below filed his bill against the defendants, Singleton and Glasscock, alleging in substance that he, the complainant, in 1820, purchased a certain slave of the defendant Singleton, for four hundred and forty dollars, paid most of the purchase-money, and afterwards took possession; that shortly afterwards he learned that the defendant Glasscock held a bill of sale of the said negro with others, executed a few days prior to the complainant's purchase, which, as the complainant was informed, was given to secure a certain supposed debt; that the said Singleton, notwithstanding said bill of sale, was permitted to remain in possession of the said negro, as owner, without

notice or knowledge to the complainant of the said conveyance; that afterwards, as the complainant was informed, a compromise was made between Glasscock and Singleton whereby the former received in lieu of the said negro certain other negroes, together with a written order on some third person for about three hundred dollars, which he had retained and of which he had given no notice of dishonor to Singleton; that after this compromise, the said Glasscock sent word to the complainant that the matter had been settled, and that he had no claim to the said negro, but that in November, 1821, the said Glasscock clandestinely took the said negro from the complainant's possession, and had ever since retained and secreted him from the complainant. The bill then prayed a decree for the return of the slave and his profits, or for the repayment of the money paid by the complainant, etc.

The answer of the defendant Singleton was, in substance, an admission of the allegations of the bill. The defendant Glasscock stated in his answer that in 1819 or 1820 the defendant Singleton executed to him a deed of trust of the negro in question, with two others, to secure a debt due him which was duly recorded; that he being about to have the negroes sold under the deed of trust, the defendant Singleton, in preference, sold them to him in discharge of the debt, and gave him a bill of sale of them; that the negroes were delivered, but at Singleton's solicitation he left two of them (one of whom was the negro in question) in the said Singleton's possession to help manage his crop, he agreeing to return them about Christmas, and he, Glasscock, promised that if Singleton would pay him six hundred dollars at Christmas, he would re-sell the negroes to him and give him time to pay the balance of the purchase-money; that Singleton failed to pay the six hundred dollars, or to return the negroes to him, when he, Glasscock, having taken legal advice, went to take possession of said negroes; that Singleton delivered up one of them, and gave him a letter to the complainant directing him to deliver the other one, stating that he had sold said negro to the complainant, but that he had no authority to do so, as the same was Glasscock's property; that the complainant stated to the defendant Glasscock that he had sold the negro, and that he was then on his way to New Orleans, but that the defendant did not believe him; that he informed Singleton of these facts, who then proposed to give him an order on one Byrne, his agent, for four hundred and forty dollars, with the understanding that if it was paid he was

not to trouble himself further about the negro, but otherwise he should enforce his right to the negro; that the order was given accordingly, but that Byrne had no funds to meet it, but offered to accept it conditionally upon the event of a suit in chancery, which the defendant refused, though he was willing to receive the money by the time contemplated to avoid litigation; that learning afterwards that the complainant had deceived him, and that he still had the negro, he, the defendant, by advice of counsel, went and took said negro.

Other facts are stated in the opinion. Decree that the defendant should deliver up said negro and render an account of the profits, from which the defendant appealed.

Leigh, for the appellant.

Wickham, for the appellee.

COALTER, J. The jurisdiction of a court of chancery, I think, can be maintained in this case, if on no other ground, on the one taken in the argument, that if the plaintiff in equity had sued at law, he could have been successfully resisted by the mortgage, which was duly recorded. Even if the bill of sale had been produced there, it might not have been a clear case at law that it was a release of the mortgage, so as in that court to divest the legal title, and leave the defendant simply on his title under the bill of sale. This, however, would be the consequence in a court of chancery, where substance is looked to, as decided in the case of *Clayborn v. Hill*, 1 Wash. 177 [1 Am. Dec. 452]. There it was decided that the mortgage, being recorded, was not fraudulent and void by reason that the possession remained with the mortgagor; but that the subsequent absolute bill of sale operated as a release of the mortgage, and became the title under which the bargainee held; and that a continued possession in the bargainor afterwards, rendered that conveyance void. But the defendant could have kept that bill of sale in his pocket, so that a resort must have been had to a court of equity to extract it; and if, for this purpose, the appellee had a right to come into equity, I can see no reason why he should not claim relief also there; so as to have possession restored, and an account of hires and profits. Besides, he had a right to go into equity in order to inquire into the compromise between the appellant and Singleton, the bargainor, and the compensation received under that agreement. Had the slave not been taken from the possession of the

appellee in the manner he was, the appellant must have sued at law; and had he recovered there under his mortgage, the appellee surely could have inquired into these matters in a court of equity. The manner of that possession, admitting that it was not a stealing, as it has been denominated at the bar, and was not absolutely illegal, provided the party could have shown a better title, is nevertheless such a procedure as does not deserve the countenance of courts of justice, and can not be insisted on in equity as placing the party on higher ground than he would have occupied, had it not taken place.

As to the merits, it seems to me that on both points they are equally clear for the appellee: *Twyne's case*, 3 Co. 80, where it was held that absolute conveyances of goods, not accompanied by possession, are fraudulent and void, "for that the donor continueth in possession, and useth them as his own, and by reason thereof he tradeth and trafficketh with others, and defrauds and deceives them," followed up by the cases of *Edwards v. Harbin*,¹ *Hamilton v. Russel*,² and by the case of *Clayborn v. Hill*, above noticed [1 Am. Dec. 452]; *Fitchugh v. Anderson*, 2 Hen. & M. 289 [13 Am. Dec. 625]; and *Alexander v. Deneale*, 2 Munf. 341, and other cases in this court, clearly show that the bill of sale to the appellant was fraudulent and void as to the appellee, at the time he made his purchase.

But, it is argued, that the appellee can not avail himself of this, because he also permitted the property to remain with the seller, and that his purchase was therefore void.

In the first place, it does not appear to me that this is proved. Delivery at the moment of the sale is not necessary. The possession must remain, and if it did so, it was a matter very susceptible of proof. The appellee was found in possession by the appellant, and although it does not appear when that possession was acquired, yet, as this court will not presume a fraud, there ought to have been proof of it by him, who seeks to avail himself of such fraud.

But if it were otherwise, and if we must take it that it did so remain, still if he got possession before any one was deceived, and became a purchaser thereof, it is not void. I speak of subsequent purchasers, not of creditors. The appellant is not such a purchaser, and I can not perceive how this prior purchase, which was void as aforesaid at the time the appellee purchased and paid his money, can be reinstated, so as to place him in the condition of a subsequent purchaser.

This seems, indeed, not to be contended for to this extent; but it is said that there is *par delictum*, and that there is equal equity, and the appellant, not only being prior in time, but being defendant in equity, must prevail. But it seems to me that this is not so as to either point. It is true, if there had been a subsequent purchaser to both, neither could have prevailed against him, if possession remained, as has been alleged. He would have advanced his money, and must have held the property; but the appellant was not so deceived, and did not so advance his money. The appellee, however, was so deceived by the conduct of the appellant, and so there is no *par delictum*, and the equity is not equal.

As to the compromise and compensation received by the appellant from Singleton it is clearly proved by many witnesses, and it is admitted that it would have put this case to rest, had it not been entered into, as is alleged, in consequence of a false suggestion by the appellee, that the slave was not in his possession when demanded. This suggestion, true or false, could only have operated on the appellant, so as to prevent his summary mode of redress afterwards resorted to. It could no more have prevented a suit against the appellee, or caused the appellant to resort for satisfaction to Singleton, than if he had simply refused to deliver him. But how was the fact? The appellant admits in his answer that he did not believe this statement; and he also admits that before he made the compromise he had taken the advice of Pindal as to this summary redress. But he wished probably to avoid the scandal of such a transaction, and preferred trying to obtain satisfaction from Singleton. This he did, and procured an order for four hundred and forty dollars, bearing interest, the price which the appellee gave for the slave. The price of the three negroes sold to this appellant being about one thousand and one hundred dollars, and the two he received being about twenty years of age, and one about eighteen, whilst the one in dispute was about twelve, it is fair to presume that he considered he obtained more than he gave for him. Nor is it at all unlikely that he should so have expressed himself, when speaking of the transaction. The witnesses who testify to this are in no other wise discredited, and ought not to be disbelieved from the mere improbability of such a conversation, especially as many others prove his declarations that he had made the compromise and was satisfied.

On every ground, therefore, the decree must be affirmed.

The other judges concurred.

BROOKE, President, and GREEN, JJ., absent.

RETENTION OF POSSESSION BY VENDOR OR MORTGAGOR.—See on this subject *Sturtevant v. Ballard*, 6 Am. Dec. 281; *Babb v. Clemson*, 13 Id. 684; *Coburn v. Pickering*, 14 Id. 375; *Rocheblave v. Potter*, Id. 305, and note; and *Bissell v. Hopkins*, 15 Id. 259, and the notes to those cases.

CULPEPER AGRICULTURAL AND MFG. SOC. v. DIGGES.

[6 RANDOLPH, 165.]

WAIVER OF OBJECTION TO IRREGULARITY BY JOINING ISSUE.—A plaintiff waives his objection to the defendants being allowed to appear and plead without giving special bail, by joining issue without making the objection and the appearance bail are discharged.

CORPORATION MUST SUE IN ITS TRUE NAME, although contracts may be made with it by a mistaken name, if the mistake be in *syllabis et verbis*, and not in *sensu et re ipsa*, and such mistake may be averred in pleading, or shown in evidence under the general issue.

VARIANCE IN THE NAME OF A CORPORATION, by adding or omitting words, is not fatal, if there be enough to distinguish the corporation.

NUMERER OF CORPORATION, WHAT IS NOT.—A bond executed to the "president and managers of the Culpeper Agricultural and Manufacturing Society," may be sued on by the "Culpeper Agricultural and Manufacturing Society."

APPEAL from the Fauquier superior court of law in an action of debt on a bond. The declaration alleged that the plaintiffs were incorporated by the name of "The Culpeper Agricultural and Manufacturing Society," and that the bond was executed to the plaintiffs by the name and style of "The president and managers of the Culpeper," etc. Appearance bail was given, and the defendants appeared, and without having given special bail pleaded that the plaintiffs were an unchartered bank, etc., to which the plaintiffs replied generally, and issue was joined. The defendants afterwards demurred, and the plaintiffs joined in demurrer. Judgment for the defendants, from which the plaintiffs appealed.

Harrison, for the appellants, objected: 1. That the defendants should not be permitted to appear and plead without having given special bail: 2. That the plaintiffs might sue on the bond notwithstanding the error in the name of the corporation, citing 10 Co. 125; 11 Id. 19, 20, 21; 2 Bac. Abr. 5, tit. Corporation; *College of Physicians v. Salmon*, Id. Raym. 680; *Sidney College v. —*, 1 Wils. 184; *Dutch East India Co. v. Henriques*, Id. Raym. 612; *Mayor, etc., v. Blamire*, 8 East, 492.

Leigh, for the appellees, insisted: 1. That the objection to the defendants being allowed to plead without bail was waived by the plaintiffs joining issue; 2. That the variance in the name of the corporation was fatal, citing 2 Com. Dig. 298, tit. Capacity, B, 5; *Corydon Hospital v. Farley*, 6 Taun. 467.

GREEN, J. The objection now taken by the appellants, that the appellees were improperly permitted to appear, plead, and demur, without giving special bail, was waived by the appellants taking issue on the plea and joining in the demurrer without making this objection in terms; and the appearance bail was thereby discharged, as was decided in *Grays v. Hines*, 4 Munf. 437. The appearance of the defendants, and pleading without giving special bail, superseded the issue joined upon the plea put in by the bail for their appearance, and rendered it null. In strictness, perhaps, it ought to have been set aside, but the omission to do so is no error to the injury of the appellants.

The declaration alleges that the plaintiffs were incorporated by the name of "The Culpeper Agricultural and Manufacturing Society;" and avers that the defendants executed their obligation to them by the name of "The President and Manager of the Culpeper Agricultural and Manufacturing Society;" and upon a demurrer to this declaration, the question is, whether such an averment can be made against the terms of the obligation as described in the declaration. If it can, then, instead of demurring, the defendants should have pleaded that certain persons by name were "The President and Managers of the Society," and that the bond was made and delivered to those persons individually, and traversed this averment in the declaration. For, by demurring, they admit the averment to be true if it is competent for the plaintiffs to make it. This averment might, I think, be well made. Although a corporation can not sue but in its true name, contracts may be made by and with it by a mistaken name, if the mistake be only *in syllabis et verbis*, and not *in sensu et re ipsa*, as is said by the court in the case of *The Mayor and Burgesses of Lynn Regis*, 10 Co. 125; and such a mistake may be averred in pleading, or shown in evidence, upon the general issue: *Id.*, and *Gilb. Hist. C. B.* 179, Cap. 17, cited in 6 Vin. Abr. 320. If some words are added to, or omitted in, the true name of a corporation, this is not a fatal variance if there be enough to distinguish the corporation from all others, and to show that the corporation claiming, or against which a claim is asserted, was intended, of which many examples are given in the case cited from Coke's Reports.

If, in this case, the bond had been given to "A. B., President, and C. D., Managers, of the Culpeper Agricultural and Manufacturing Bank Society," or to the "President and Managers of the Culpeper Agricultural and Manufacturing Bank," I should have thought that it could not have been averred or shown by proofs, that it was, in truth, given to the "Culpeper Agricultural and Manufacturing Society;" for this would be in opposition to the legal import of the deed itself. In the first case, the legal effect of the deed would be to create an obligation to the individuals named, and the addition of "President and Managers" would be only a superfluous description of the particular individuals meant, or at most an indication that the obligation was made to them for the benefit of the corporation, and in the other, the name of the corporation in the bond would be different in sense from the true name of the corporation claiming it as made to them. But in this case, the naming of the "President and Managers," without using their proper names, does not in any degree contradict the averment that the bond was made to the corporation, but is entirely consistent with it, since it clearly indicates that the bond was given to them and the other corporators, not in their individual, but in their corporate characters.

I think the judgment should be reversed, the demurrer overruled, and the cause remanded for a trial of the issue in fact joined between the parties.

The other judges concurred, and the judgment reversed, etc.

MIENOMER OF CORPORATION.—As to the effect of a mistake in the name of a corporation in a contract made with it, see *Berks Turnpike Road v. Myers*, 9 Am. Dec. 402, and note. Mienomer of a corporation plaintiff is not a ground of nonsuit, and can be taken advantage of only by a plea in abatement: *Bank of Utica v. Smalley*, 14 Am. Dec. 526.

KELLY v. KELLY'S EXECUTORS.

[6 RANDOLPH, 176.]

FATHER ADVANCING HIS CHILD TO WHOM HE IS IN DEBT is presumed to do so with a view to the discharge of the debt, unless the circumstances prove a contrary intention.

CONVEYANCE OF LAND, in such a case, will be presumed in satisfaction of a money debt, if such appears to have been the intention.

APPEAL from the Fredericksburg chancery court. The opinion states the case.

Briggs and Leigh, for the appellants.

Harrison and Stanard, for the appellees.

CARR, J. John Kelly married a lady of the name of Paine, and received by her (it is said) twelve slaves. She died, leaving five children. In 1797, John Kelly, being about to marry a second wife, executed a deed of gift, conveying to his children, in different proportions, all the slaves he had received by their mother, which were to be delivered to them "at lawful age, or marriage." This deed was duly recorded, and the slaves were, at different periods, delivered to the children. The second marriage took effect, and eight children were the fruit of it. In 1809, one Yates, by will, bequeathed to the children of Kelly by his first wife one thousand dollars, to be equally divided among them. In 1810, Kelly was appointed guardian of his children as to this legacy, and not long after received the money. On the thirty-first of March, 1814, J. Kelly and his wife executed five deeds, conveying to each of his children by his first wife, one hundred acres of land, which it is agreed on all hands were worth more than their shares of the legacy. All these children were then of age, except one. The consideration expressed in the deeds, is natural love and affection, and one dollar. The deeds were accepted, recorded, and the children took possession of the land. In 1815, J. Kelly made his will, in which he gives again to the children by his first wife, the slaves and land before conveyed. He gives the rest of his land and slaves to his wife, for life, and at her death, the land to be divided among his children by the last wife, and slaves among all his children by both wives. In 1820, J. Kelly died, and in 1822, the children by the first wife filed their bill against their father's executors, to recover their legacy of one thousand dollars, left them by Yates. The chancellor dismissed their bill, and they appealed to this court.

The only question in the cause is, whether this legacy must not be taken as satisfied by the land conveyed to the plaintiffs in 1814. This, it will be observed, is not a question whether a debt is extinguished by legacy; nor whether a provision secured to children by settlement, is satisfied by portions given them by the will of a parent; nor yet, whether a legacy be adeemed by an advancement made in the life of the testator; but simply, whether a parent, owing his children a debt, and making them a deed for property of greater value than the debt, shall be considered as having given them this property (leaving the debt still unpaid), or as having discharged the debt by the conveyance of the property. We will consider this question: 1. On

the presumption arising from the acts of the parties; 2. On the evidence.

On the first head, I will cite some cases, which seem to me very strongly in point: *Wood v. Briant*, 2 Atk. 521. The plaintiff's wife was entitled to the residue of her grandmother's estate under her will, and likewise was left executrix, and *durante minore ætate* her father was administrator. At the time of her marriage with the plaintiff, he was, by agreement, to have eight hundred pounds from the father; which, in the settlement, is mentioned to be a portion, and in consideration of natural love and affection. The father being dead, this bill was filed against his representative, for a settlement of the grandmother's estate; and it was insisted, that the eight hundred pounds paid by her father on her marriage, was not in satisfaction of this residue, especially as it was expressed to be given for natural love and affection, and as the father, at the time of the marriage, was worth eight thousand pounds, and had but this daughter and a son; and *Chidley v. Lee*, Prec. in Ch. 228, was cited, where a portion given in this way had been decided to be no satisfaction. There was evidence given of parol declarations made by the plaintiff and his wife shortly after the marriage, that the eight hundred pounds were intended as a satisfaction of the residue, as well as a portion; and on the other side, declarations of the father, that the residue amounted to five hundred pounds, and that he intended to give the plaintiff one thousand pounds more, and that six weeks before his death, he told the plaintiff: "Thou knowest I owe thee a great deal of money, and thou shalt not be wronged of a farthing." Lord Hardwicke says: "The first question is, whether there is a presumptive satisfaction of the legacy to the plaintiff's wife under the grandmother's will, by the eight hundred pounds being advanced to her by the father on her marriage. I do not think any rule can be laid down, but the cases must depend upon their particular circumstances. There are very few cases where a father will not be presumed to have paid the debt he owed to a daughter, when, in his lifetime, he gives her in marriage a greater sum than he owed her; for, it is very unnatural to suppose, that he would choose to leave himself a debtor to her, and subject to an account. As to the case of *Chidley v. Lee*, the ground Sir John Trevor went upon was, that the husband knew nothing of the legacy to the wife from a collateral ancestor, and therefore held it was not satisfied by the portion. But, I must own that I think that an extreme hard case, and I believe I should have been inclined to have

decided it otherwise. If the present case, therefore, rested on the presumption only, I should be of opinion that the eight hundred pounds was a satisfaction of the residue, under the grandmother's will." The parol evidence he considered as making the case still stronger for the defendant, and refused the account (as to the residue) prayed for.

Seed v. Bradford, 1 Ves. sen. 501: B. was indebted to his daughter one hundred and four pounds, being one fifth of a legacy left her and her four sisters, by their grandfather. Upon the marriage of the plaintiff with the daughter, B. agreed to give his daughter four hundred pounds. On the wedding-day B. brought forward the money, and one witness stated that he said: "There is the money I give my daughter; but that is not all." The marriage took place in 1740. The wife died in 1742; the father in 1746. No demand was made of the legacy during the father's life. The husband, as administrator of his wife, filed this bill to recover the legacy. The case of *Wood v. Briant*, quoted above, was relied on for the defendant. Sir John Strange dismissed the bill. He said the demand should have been made in the life of the father, who was a party to the transaction, and could have given some account of it; that there was no occasion for an express stipulation; that the four hundred pounds were paid in full satisfaction of the legacy, and not out of his own pocket; but every case must be taken with the circumstances upon which the court goes, to see whether, from the nature of the transaction and demand, it is not implied that the money thus given in the lump, included what the father gave by bounty, and also what came into his hands as belonging to his child. That is the natural transaction; and otherwise the court must suppose he meant to give the four hundred pounds out of his own pocket, and suffer himself still to remain liable to that demand and interest.

The only other case I shall cite is *Chave v. Farrant*, 18 Ves. 8: B. gave by will to his granddaughters, Mary, Sarah, and Betty Farrant, one hundred and fifty pounds each. These legacies came to the hands of their father. His daughters all married during his life, and he gave to or in trust for each a marriage portion of one thousand pounds. No demand of the legacies was made in his life-time; but the three daughters and their husbands filed the bill for their legacies of one hundred and fifty pounds, with interest. Sir William Grant says: "Upon looking into the settlements, I find nothing from which any inference can be drawn as to the intention of the parties. In

Mrs. Chave's her father covenants to pay one thousand pounds for the portions of his daughters. It does not appear that the husband knew of the debts. My opinion is, that the father giving the portion must be taken as meaning to satisfy the debt he owed as executor of the grandfather. That is established, in opposition to *Chidley v. Lee*, by the more recent cases of *Wood v. Briant*, and *Seed v. Bradford*," the two before cited. He then repeats the words of Lord Hardwicke, in *Wood v. Briant*.

These cases, it will be observed, clearly establish this point; that in absence of all explanatory evidence, a father advancing his child, to whom he is at the same time in debt, shall be presumed to do so with a view to the discharge of the debt, if the sum advanced be sufficient; and that, even though it is a portion given in marriage. The case before us is much stronger than those cited, to raise the presumption of payment; for the advancement here was not made on the marriage of the children, nor when there was any other reason for it than the wish of the father to discharge his debt. It was made by five deeds, bearing the same date, conveying to each child the same quantity of land, one of them being still an infant, and giving them, exclusive of this, an equal, and some witnesses say, a better portion of his estate than his younger children.

If it be objected that the legacy was a money debt, and the property conveyed land, and that therefore, upon the doctrine of *ejusdem generis*, the latter can not be considered as a satisfaction of the former, I answer that this conclusion is by no means sound. A careful examination of the cases on this subject will show that all depends upon intention. This intention you must ascertain in the best manner you can, from all the circumstances attending the act. When a child is entitled to a portion of five hundred pounds, or the father has left him five hundred pounds by will, and afterwards in his life advances him five hundred pounds; this sum being the same in amount and the same in kind, these are taken as circumstances tending to show that the advancement was made in satisfaction of the portion or legacy. On the contrary, if the advancement was land, it is taken as *prima facie* going to show that it was not intended as a satisfaction of the five hundred pounds, they being different things. But yet, these are mere presumptions, liable to be rebutted and overthrown. For, if it be made to appear that the father did not intend the five hundred pounds advanced to go in satisfaction of the portion or legacy, it will

be no satisfaction, though *ejusdem generis*; and if we be convinced that he did mean the land as a satisfaction, it will be so taken, though not *ejusdem generis*. For the cases showing this to be the law, I refer to *Jones v. Mason, ex'r etc.*, 5 Rand. 577 [16 Am. Dec. 761]. Now, I have stated the strong facts in this case, which show so clearly the intention of the father to discharge his debt by the conveyance of the land.

But if, leaving the ground of presumption, we come to the evidence, the case is put beyond doubt; for it is proved that the father in the first place offered to sell to his children this same land at eight dollars per acre, thus clearly proving that he did not intend to give it. They refused to give that price, but said that they would take the land for their legacies, and on no other terms; and soon after the deeds were executed and sent to them, and they received them upon the understanding, as every one must see, and as two or three of the plaintiffs declared, that they were made to discharge the debts. But they were a payment and a bounty too, for they overpaid the legacies double and treble. In addition to this, the deeds were made in 1814, and the father lived till 1820, and during all that time we hear not a word from the plaintiffs about the legacy; no demand. Why? Because they were conscious they were paid.

I am clear, therefore, on every ground, to affirm the decree.

The other judges concurred, and the decree was affirmed.

RHODES v. COUSINS.

[6 RANDOLPH, 188.]

INJUNCTION AGAINST DEBTOR DISPOSING OF PROPERTY.—Only a judgment creditor can have the assistance of a court of equity to control, prevent, or interfere with a debtor's disposition of his property.

WHAT NECESSARY TO AFFECT LAND OR PERSONALTY.—To affect the debtor's land in such a case the creditor must have judgment and take his *elegit*, and to affect personalty he must have judgment and execution issued.

NE EXCEAT CAN BE ISSUED only when it appears: 1st, that there is a precise amount of debt positively due; 2d, that it is an equitable demand not suable at law, except in cases of account and some others of concurrent jurisdiction; 3d, that the defendant is about quitting the country to avoid payment.

NECESSITY OF AFFIDAVITS TO PROCURE WRIT.—A writ of *ne exceat* can not be granted in this state, except upon a bill filed and affidavits made to the truth of its allegations.

NE EXCEAT WILL NOT BE GRANTED WHERE BAIL can be demanded at law.

APPEAL from the chancery court of Richmond upon a bill filed

by Cousins against Grymes, Rhodes, and Moore. The opinion states the case.

Wickham, for the appellant.

May and Spooner, for the appellee.

CARR, J. The bill presents this case: That in the winter of 1820-21, Cousins indorsed for Grymes (a grocer) an accommodation note, to be discounted at the bank, for fifteen hundred dollars; that the note had been renewed from time to time, and the one last given would become due in about four weeks; that the plaintiff will, no doubt, have to take up the note when it falls due; that the said money was borrowed to pay debts which Grymes contracted in supplying his store with groceries; that a few days before he had been surprised to discover in a Petersburg paper (where the parties live) an advertisement of the stock of goods belonging to Grymes, to be sold on the eleventh of September, by a certain Jer. Rhodes, an Englishman, having no fixed residence here, and who had avowed his intention of returning in a short time to England; that on inquiry of Grymes he told him, that being a secret partner, Rhodes had obtained a deed of trust from him by deception and fraud, and under it was about to sell the goods. He charges that Rhodes has been a sleeping partner since the last fall; that he has reason to believe that he will leave this country with all his effects, if not prevented, before the note comes due, previous to which time the plaintiff can have no redress at law; that Grymes is insolvent; that the goods are in possession of Moore, an auctioneer. The prayer of the bill is, that an injunction issue to prohibit a sale, or a return of the goods by Moore to the other defendants; or to stay fifteen hundred dollars in the hands of Moore, if a sale be thought proper; or to grant a *ne exeat*.

Taking this matter up simply upon the case made by the bill, it is clear to me that the plaintiff had no right to the aid of equity, either by way of injunction or *ne exeat*.

1. As to the injunction. It is well-settled law, that none but a judgment creditor can have the assistance of equity to control, prevent, or interfere with, in any way, the disposition which a debtor may choose to make of his property. He may destroy it, give it away, convey it fraudulently, or sell it and waste the money, and no creditor at large can stop him by injunction. A creditor must have proceeded as far as he can at law. If he means to affect the land, he must have a judgment, and take his *elegit*. If the personalty, there must be judgment and ex-

ecution issued; and he must show in his bill that he has done this, or it may be demurred to: See *Mitt. Pl.* 114-15; *Angell v. Draper*, 1 Vern. 399; *Shirley v. Watts*, 3 Atk. 200; *Bennet v. Musgrave*, 2 Ves. sen. 51;¹ *Balch v. Wastall*, 1 P. Wms. 451;² *Cooper's Eq. Pl.* 149; see, also, *Wiggins v. Armstrong*, 2 Johns. Ch. 144. That case was thus: Plaintiff had two notes on D. to a large amount, on which D. confessed a judgment to a greater amount to another person. The bill charged a fraudulent collusion; that the judgment was voluntary and without consideration, and with intent to defraud the plaintiff; and he prayed an injunction against proceeding on the judgment by execution. An injunction was granted. No answer was put in; but a motion was made to dissolve, on the ground that the plaintiff, not being a judgment creditor, had no lien on the property of the debtor, and no right to question the judgments. The chancellor reviews the cases with his usual care, and comes to the conclusion that a creditor at large, and before judgment and execution, can not be entitled to the interference of equity. He remarks, very sensibly: "The reason of the rule seems to be, that until the creditor has established his title he has no right to interfere; and it would lead to an unnecessary, and, perhaps, a fruitless and oppressive interruption of the exercise of the debtor's rights. Unless he has a certain claim upon the property of the debtor, he has no concern with his frauds."

The same doctrine is again discussed, and considered as settled, in 2 Johns. Ch. 284; 4 Id. 671, 682. This court, also, in the case of *Chamberlayne v. Temple*, 2 Rand. 384 [14 Am. Dec. 786], lays down the doctrine in the same way, and strongly and forcibly illustrates the mischiefs and inconveniences of a contrary proceeding.

In the case before us, the plaintiff not only had no judgment, but he was not even a creditor. True, he had indorsed a note for Grymes; but he might never be called on to pay it; or, called on, he might not be able to pay it; and in either case, he could have no demand on Grymes. What right, then, had he to claim the interference of equity to disturb the arrangement made between Grymes and Rhodes; to forbid the sale of the goods; and to take them wholly from the possession of the owners, for an indefinite space of time?

2. Just as unfounded seems to be the attempt of the plaintiff to obtain a writ of *ne exeat* against the defendant, Rhodes, and his effects. As no such writ was issued, I shall pursue that sub-

1. *Bennet v. Musgrave*, 1 Ves. sen. 51.

2. 1 P. Wms. 445.

ject no further than just to remark, that our act of assembly does not regulate the proceeding on the *ne exeat*, further than to say (1 Rev. Code, 217, sec. 110), that writs of *ne exeat* shall not be granted, but upon bill filed and affidavits made to the truth of its allegations; that if granted, the court or judge shall direct to be indorsed thereon in what penalty bond and security shall be required of the defendant; and that if the defendant shall, by answer, satisfy the court or judge that there is no reason for his restraint, or give sufficient security to perform the decree, the writ may be discharged. What the allegations in the bill shall be to justify the writ, the law has left to the court, who must be guided by the rules settled in such cases. The *ne exeat*, as now understood and practiced upon, is a proceeding in equity to obtain bail, in a case where there is a debt due in equity, though not at law; for, if it be a legal debt, then you may take bail at law, and equity will not entertain you, except in cases of account, and perhaps a few other cases of concurrent jurisdiction. The general rule is, that where you can get bail at law, equity will not grant the writ. In the exercise of this power, courts of equity are very cautious, as it is a strong step, tending to abridge the liberty of the citizen. To induce that court to issue a *ne exeat*, it must appear: 1. That there is a precise amount of debt positively due; 2. That it is an equitable demand, upon which the plaintiff can not sue at law, except as before, in account, and some other cases of concurrent jurisdiction; 3. That the defendant is about quitting the country to avoid the payment.

As to the first, in *Jackson v. Petrie*, 10 Ves. 163, Lord Eldon says: "The affidavit must be as positive as to the equitable debt, as an affidavit of a legal debt, to hold to bail; nor do I recollect that this court has granted the writ upon an affidavit stating merely information and belief as to the amount of the debt, except where it is matter of pure account." In *Haffey v. Haffey*, 14 Ves. 261, Lord Eldon mentions a very hard case, to show that under circumstances which would not entitle you to bail if your demand was a legal one, you shall not have it in equity. It was decided by Lord Thurlow. A bond was payable on the first of January. The obligor, by agreement, obtained indulgence till the first of July. In the last week of June he declared his intention of leaving the kingdom to evade payment. There was the agreement and the bond; yet it was held, that as under that agreement, which prevented the obligee from getting bail at law, the money was not due in

equity, he could not have the writ. To obtain the writ, it is also necessary that the affidavit must be positive as to the defendant's intention to go abroad, as to his threats or declarations to that effect, or to facts evincing it. In *Odham v. Odham*, 7 Ves. 210,¹ the court said, in relation to this: "It is not sufficient to show that another person said so."

In the case before us, there is no debt due. If due, it would be a legal debt, on which bail at law might be demanded. There is no sufficient affidavit of intention to leave the country. The courts in England have thought these guards necessary to protect the personal liberty of the subject; and we, surely, can not think them less so here.

On every ground, then, this bill, taking it as true, is insufficient, and should never have been received. I have put the case on the strongest ground for the plaintiff; for he could not do more than prove his case, and in truth, he has fallen far short of it. I am clear that the decree be reversed, and the bill dismissed.

Upon the subject of the writ of *ne exeat*, I refer to the following cases: 2 Ves. sen. 489; 3 P. Wms. 312; 3 Bro. C. C. 218; 2 Atk. 210; 1 Ves. jun. 94; 5 Ves. 91; 6 Id. 163, 283; 7 Id. 171, 172; 8 Id. 593; 9 Id. 464; 16 Id. 163; 11 Id. 54; 14 Id. 261; 15 Id. 444; 16 Id. 470; 18 Id. 352; 1 Ves. & Bea. 372; Jac. & Walk. 405; 1 Johns. Ch. 1; 2 Id. 169. See, also, Beame's Brief View of the Writ of *Ne Exeat*, *passim*.

The other judges concurred, and the decree was reversed, and the bill dismissed.

INJUNCTION AGAINST A DEBTOR'S ALIENATION OF PROPERTY.—A creditor who has obtained a verdict, but has not recovered judgment, can not have his debtor enjoined from disposing of his property, although the latter is trying to elude the judgment: *Moran v. Dawes*, 14 Am. Dec. 550.

NE EXEAT.—The nature and purposes of the writ of *ne exeat*, and the law relating to its use in the United States, are discussed in the note to *Gibert v. Colt*, 14 Am. Dec. 560.

HITE v. LONG.

[6 RANDOLPH, 457.]

TRESPASS BARRED BY JUDGMENT IN TROVER, WHEN.—A judgment for the defendant in an action of trover or detinue for a chattel is a bar to an action of trespass for the same chattel; for the trespass is waived by bringing trover or detinue.

IN TRESPASS FOR TAKING A CHATTEL the plaintiff may recover both the value of the property and damages for the violence used.

PLAINTIFF CAN NOT CARVE TWO SUITS OUT OF ONE CAUSE of action. Therefore, where the plaintiff's team was stopped by the defendant, and a horse taken therefrom, it was held that the plaintiff could not bring trover for the horse taken, and trespass for stopping the team and delaying his journey, because it was all one act.

DECLARATION IN TRESPASS NOT ALLEGING PROPERTY in the plaintiff in the thing taken is bad on demurrer.

WHAT FORCE OWNER MAY USE TO TAKE HIS PROPERTY.—The owner of a horse, which another's servant has harnessed in his team, and is driving violently away, may stop the team, using no more force than necessary, and retake his horse; and a plea setting forth these facts in an action of trespass by the owner of the team for stopping the same is good, where the plaintiff does not claim property in the horse.

APPEAL from the Frederick superior court of law. The opinion states the case.

Stanard, for the appellant.

No counsel *contra*.

COALTER, J. This is an action of trespass instituted by James Long against Isaac Hite, in the superior court of law for Frederick county, on the thirty-first of July, 1818.

The first declaration filed in the cause (at October rules, 1818), is for this: that the said Hite, with force and arms, stopped in the highway a wagon and team belonging to the plaintiff, and then in his possession, and took therefrom one of the horses belonging to the team of the plaintiff, in possession of the plaintiff, and the property of the plaintiff, of the value of two hundred dollars, and converted him to his own use, and other wrongs, etc., the plaintiff did against the peace of the commonwealth.

At May term, 1819, the office judgment was set aside, and the defendant pleaded not guilty, and issue was taken thereon, and leave was given him to file additional pleas, and the cause was continued. The record then proceeds to state that the defendant filed the following pleas, to wit: 1. That the horse in the declaration alleged to have been taken from the team of the plaintiff was the property of the defendant, wherefore he took him peaceably, and without force, from the said team, which is the same trespass in the declaration supposed, and traverses that he committed any other trespass, or used any force in taking the horse; 2. That on the day, etc., a wagoner, whose name then was, and yet is, unknown to the defendant, was then and there driving the supposed wagon of

the plaintiff, and had the horse in the declaration mentioned, of the property of the defendant, without his consent, and against his will, geared and harnessed to the wagon, and driving him therein, whereupon the defendant demanded the horse, he, the defendant, having the right of property and the right of possession, which was refused, and the wagoner forcibly, and with great speed, drove the said wagon, in order to prevent the defendant from retaking the said horse, and to prevent his being carried off, and to regain his horse, the defendant gently laid his hands upon the horses in the wagon, and peaceably took the said horse, being his own property, etc.

Then follows this plea: And the said defendant, to the original declaration in this cause, and for plea since the last continuance, says that heretofore, to wit, on the thirty-first of July, 1818, the plaintiff sued out his *capias* in trover for a certain horse against the defendant in the superior court, etc., wherein it was so proceeded that at the last term, etc., there was a judgment for the defendant, and that the horse in the said action of trover claimed, and the horse in the said original declaration, are one and the same, and not different, etc. To this plea the plaintiff demurred, alleging for cause that the action of trover was different from the subject-matter of this suit; there the plaintiff sought to recover the value of the horse; in this suit he seeks to recover damages for a trespass.

All this seems to have been done at the May term, 1819. The other pleas (except that of not guilty) seem to have stood without issue, either in fact or law, being taken on them.

At May term, 1820, the cause came on upon the demurrer to the plea, and judgment on it was given for the plaintiff. Whereupon the plaintiff moved the court for leave to amend his declaration, by adding a new count. This was objected to by the defendant, because, if the declaration was defective, judgment on the demurrer ought to be against the plaintiff, and if not defective, leave to amend ought not to be given, as he had no right to make out a new case; also, because the defendant did not ask leave to amend his plea, and because a judgment stood against him on one plea, and there was an issue made upon another plea to the declaration in its original form. But the court permitted the plaintiff to amend, because the amendment sought by the plaintiff was not to make out a new case, not because the present declaration was defective in

point of law, but because the plaintiff wished to state the same cause of action more fully, distinctly, and at large, to enable the jury more clearly and correctly to understand the nature of the injury complained of. The amended declaration was then filed.

It is a complete declaration, though possibly is only to be considered a second count to the first declaration, as neither that declaration nor the pleadings thereon were withdrawn. This count or declaration charges that the defendant, with force and arms, seized and took from the wagon of the plaintiff a horse, then and there in possession of the plaintiff, of great value, say three hundred dollars, and converted and disposed of him to his own use, and also for this, that the defendant, with force and arms, etc., and aided by a troop of his negroes, etc., whilst the plaintiff's wagon and team were peaceably traveling on the highway, etc., did forcibly take from the team of the plaintiff a bay horse, then and there in the use and possession of the plaintiff, and employed in drawing his wagon, etc., whereby the waggon and team of the plaintiff were detained in the public highway, and interrupted in the prosecution of their trip, etc., and the plaintiff subjected to great trouble and expense, and loss.

At October term, 1820, the cause was continued. At May term, 1821, it appearing to the court that the amended declaration was filed before the last term, and the defendant not having entered any plea, it was ordered that he plead on or before the tenth day of the term. During this term the following proceedings were had: On motion of the defendant, he has leave to withdraw his plea of *not guilty*, and, by permission of the court, filed a special plea, which is said to be in the words following: That on the day when the alleged trespass is supposed to have been committed, and for a long time before and after, the said horse in the declaration set forth to have been taken by the defendant was and continued to be in the property of the defendant, and was then, at, etc., in the possession of a certain wagoner, whose name was and yet is unknown to the defendant, who had before that time, without the consent and against the will of the defendant, and against right, obtained and held the possession of the said horse, and refused to deliver him to the defendant, though he lawfully and peaceably demanded him; and then and there violently drove the said wagon and horses, of purpose to eloin the said horse; wherefore the defendant, of purpose to regain possession, then and there did lay his hands upon the horses in the said wagon, then and there

being in possession of said wagoner, and did take him out of the said wagon, as he might lawfully do, etc., which is the same trespass, etc.; without that, he had no farther or other force than was necessary to regain the possession of his property aforesaid; wherefore he prays judgment, etc.; without that, that the plaintiff was in possession of said wagon, or said horse, or that the defendant used force, as in the said count is supposed. And for further plea, he says nearly as last above, except, after alleging the horse to be his property, and in possession of the wagoner who was driving the team, he says (the said plaintiff then and there not being present); and when he alleges that the horse was the property of the defendant, he says (and not the property of the said plaintiff); and so going on as in the other plea, and concludes that, in order to regain his said horse, he did lay his hands upon the horses in said wagon, without using any other or further force than was necessary, etc.

The defendant also demurred to the plaintiff's declaration, for that it is double and wants form. The plaintiff demurred to the first plea: 1. Because the matter therein stated, if true, is no justification of the trespass; 2. Because it might be given in evidence under the general issue, in mitigation of damages; 3. Because it is double, relying on the right of property, and the use only of such means as were necessary to recover possession. He also demurred to the second plea for the same reasons.

The plaintiff joined in the demurrer to the declaration, but no joinders are stated in demurrer to the pleas.

At October term, 1821, the court overruled the demurrer to the declaration, and sustained the demurrers to the pleas. The defendant then pleaded not guilty, and the cause was continued.

At October term, 1824, a jury was sworn, well and truly to inquire of damages, who assessed damages to five hundred dollars; but a motion being made for a new trial, the plaintiff released one half of that sum, and judgment was rendered for two hundred and fifty dollars.

There was a bill of exceptions to two opinions of the court, but which I consider unnecessary to notice, as it seems to me the case must be decided on other grounds; but were it necessary, as at present advised, I think they were both erroneous.

The judgment in the action of trover decided the question as to the right of property in the horse, which was the main subject of controversy; but the plaintiff seems to be of opinion, in which he was sustained by the court, that although he brought his action of trover to recover the value of the horse taken

away, he had a right also to bring trespass to recover damages, as well for any violence or breach of the peace, in taking that horse, as for the trespass in stopping the plaintiff's team, in order to take him. These questions were decided on the demurrer first filed, and, therefore, the first question is, what judgment ought to have been given on that demurrer?

The declaration in this case first filed, as above stated, covered the whole ground of complaint. Under it, the plaintiff could recover as well the value of the horse taken away, as the damages sustained by stopping his team, etc. He elected though, also, to bring trover, and the question is, whether that was not in law a waiver of the whole trespass, as well that alleged to be committed in taking the horse, as in stopping the team, all being one act. A party is not precluded from bringing trover or detinue, because the taking was violent. He may waive the trespass and admit, as these actions do, that the property came lawfully into the possession of the defendant, and this the defendant can not deny or traverse, so as to defeat the action, by showing that he took tortious possession. As to the horse taken away, I can not perceive how the plaintiff is to waive this trespass, so as to recover the value in trover, and maintain another action for the trespass so waived. If he can, the defendant ought to be at liberty to plead that he took it tortiously, in order that he may not be vexed by two suits for the same thing. It is laid down in 20 Vin. Abr. 540, tit. Trespass, and the cases there referred to, that the pendency of an action of detinue or replevin for the same property, is a good plea to an action of trespass. This would close the question, it seems to me, so far as to the trespass in taking away the horse; but he also stopped the team of the plaintiff, of which this horse was one. It is all one act, though, and one cause of action. The party can go for the whole in trespass, or he may elect to sue in trover or detinue. I do not see how he can sever one cause of action, and carve two suits out of it. In his amended declaration, he seeks to present this question more plainly and distinctly, by dropping his claim to property in the horse, but still goes for the violence and force in taking him, as well as for the trespass in stopping the team. Had the original declaration been filed in this form, it would, perhaps, have shown a disclaimer of any property in the horse sued for in trover, and, therefore, I presume it was that the declaration retained its original form until after that suit was decided. This, it seems to me, is a pretty apt commentary on this effort to split one

cause of action into two; but, if the declaration had been originally so filed, claiming merely to recover damages for a trespass supposed not to be waived by the other action, it seems to me that the plea would have been equally good. If it would not, it must be because the new count presented a different cause of action, and to which the former pleadings would be no answer, which would be contrary to the leave asked.

If the plaintiff, instead of having judgment entered on his demurrer, had moved to withdraw it, and to amend his declaration, or to withdraw that declaration and file a new one, and had filed the one now in the record, the defendant could have pleaded the action of trover, and the other matters specially pleaded by him, and then there could have been no doubt but that all these matters, if proper in defense, would have availed him. The plaintiff not having done this, concerning the regularity of which I give no opinion, but leaving the judgment of the court on the first demurrer to stand in force against the defendant, we are necessarily to inquire whether that judgment was correct or not. Thinking it was not, we must then do what that court ought to have done, and, no doubt, would have done, unless there had been a motion to withdraw the demurrer on the part of the plaintiff, that is, we must enter judgment for the defendant. But, if in this I am wrong, and if the case must be considered as standing on the new declaration, and the pleadings to it, still I think judgment must be given for the defendant.

The first count in that declaration is for a trespass in taking a horse not claimed in the declaration to be the property of the plaintiff. This is bad on the demurrer filed; 6 Bac. Abr. 600, tit. Trespass, I.

The second is trespass in stopping his team and taking this horse, not claimed as the plaintiff's property, from it, there being no dispute about the residue of the team but that it belonged to the plaintiff. The defendant justifies by averring this horse to be his property, that he was geared in the team with the plaintiff's horses, and that the wagoner, the plaintiff not being present, endeavored to carry him off by violently driving the team, etc., and that he stopped the team in order to retake his horse, using no more force than was necessary for this purpose. If he was justifiable in thus stopping the team for this purpose (Bac. Abr. tit. Trespass, I), as I think he was, it was a proper matter for a plea, and the matter so pleaded being confessed by the demurrer, judgment must be for the defendant.

The judgment is therefore erroneous, and must be reversed

and entered for the appellant, and that the appellee take nothing by his bill, etc.

Judges CARR, CABELL, and the President concurring, the judgment was reversed.

GREEN, J., absent.

RULE OF DAMAGES IN TRESPASS.—As to the extent of damages recoverable for breaking and entering the plaintiff's close, and taking away his goods, see *Woolley v. Carter*, 11 Am. Dec. 520. For the measure of damages in a case of taking property attended with special circumstances of aggravation, see *Churchill v. Watson*, 5 Am. Dec. 130. See, also, on this point, *Post v. Munn*, 7 Id. 570.

WHO MAY MAINTAIN TRESPASS.—As to the possession and right of property necessary to maintain trespass, see the note to *Oreer v. Storms*, *ante*, 543.

PLEASANTS v. PENDLETON.

[6 RANDOLPH, 473.]

CONSTRUCTIVE DELIVERY BY A VENDOR OF CHATTELS is sufficient to pass the right of property.

BARGAIN STRUCK AND PAYMENT OF THE PURCHASE-MONEY vests the property of a chattel in the vendee.

SALE OF FLOUR IN A WAREHOUSE—DELIVERY.—On a sale of flour in barrels of different brands in a warehouse, where the vendor gives the vendee a bill of parcels specifying the number of barrels of each brand with an order on the warehouseman for their delivery, and receives the vendee's check in payment, giving a receipt in full, the contract is completely executed, and vests the property in the vendee so that a subsequent loss before actual delivery falls upon him.

IF ANYTHING REMAINS TO BE DONE BETWEEN THE PARTIES to put the articles in a deliverable state, the contract is not complete, and the property does not pass.

USAGE AS TO COOPERAGE ON SALE OF FLOUR.—Where there is a usage that cooperage necessary on a delivery of flour to the vendee at a warehouse is to be done by the storer at the vendor's expense, it does not constitute a case where something remains to be done by the vendor to complete the contract.

WAREHOUSE RENT DUE IS NO OBSTACLE TO DELIVERY of the flour in such a case where the usage is to charge it to the vendor, and not to make it a lien on the flour.

SEPARATION OF ARTICLES SOLD out of a large number, where all are exactly of the same quality, is unnecessary to constitute such delivery as will pass the property; as, in the case of a number of barrels of flour sold out of a larger number of the same brand belonging to the vendor and stored in a warehouse.

USAGE TO SELL FLOUR IN STORE BY ORDER, and to pass it by the transfer of the order from hand to hand without actual delivery of the flour, is reasonable and lawful.

WHEN SEPARATION IS UNNECESSARY AS TO PART of the articles included in a contract, though it may be as to the rest, title may pass as to the former, though not as to the latter.

INSTRUCTION THAT THE PLAINTIFF HAS A RIGHT TO RECOVER if the jury believe the evidence, without saying anything as to the amount of the recovery, is not erroneous if there is uncontradicted evidence establishing the plaintiff's right to any part of his demand.

APPEAL from the Henrico superior court of law. The opinion of CARR, J., sufficiently states the case.

The attorney-general and Stanard, for the appellant.

Leigh and Nicholas, for the appellee.

CARR, J. The appellee sued the appellant in assumpsit, on a contract for so much flour sold. The declaration had several counts, some special, some general. The jury found a general verdict for the plaintiff for four hundred and sixteen dollars and fifty cents, on which judgment was rendered. On a subsequent day of the term, the counsel for the defendant, with the consent of the opposing counsel, tendered a bill of exceptions to sundry opinions of the court, given on the trial. The bill sets out at large what the evidence was intended to prove, and on this statement several motions for instruction to the jury are predicated. But one of them was the subject of discussion at the bar, and to that I shall confine my remarks. The court instructed the jury "that if they believed that the evidence adduced was true, and proved every fact which it purported to prove, and that the sale took place at five o'clock in the evening, the only fact as to which there was any variance, the plaintiff had a right to recover in this action." To enable us to judge of the correctness of this instruction, we must look into the evidence first, and then to the law of the case.

On the twentieth of March, 1820, the appellee sold to the appellant one hundred and forty-one barrels of fine flour, with certain mill brands on them, according to a list stating the number of barrels of each brand. The price was three dollars and fifty cents per barrel. The flour was stored in the warehouse of J. & J. Fisher. The plaintiff received from the defendant a check on the Virginia bank for the full amount of the price, and executed and delivered to the defendant an order for the flour on the warehouseman. In the evening of the same day, the plaintiff, finding that he had mistaken the number of barrels, sent a corrected list to the defendant, reducing the number to one hundred and nineteen barrels. Upon this, the order and check were given up and a new contract made,

by which the one hundred and nineteen barrels of flour, according to the list, were sold by the plaintiff to the defendant for the same price, amounting to four hundred and sixteen dollars and fifty cents. For this sum the defendant gave the plaintiff a check on the Virginia bank, and the plaintiff gave a receipt in full, and an order for the flour. The bill of parcels, describing the flour very minutely, and the receipts, are set out at large. This last agreement was made, to say the latest, about five o'clock in the evening. It is the usage of the banks of Richmond, well known to merchants and others dealing with them, not to pay checks after three o'clock p. m. At the time of the sale the plaintiff had in the same store-house about three hundred barrels superfine flour, and there were there also between two and three thousand barrels, belonging to others, of different qualities and brands, but none other but the plaintiff's with the same brands as the one hundred and nineteen barrels. At the time of giving the order for the flour there was a considerable fall of rain, which continued till night. At the time of sale the plaintiff had in fact four more barrels of fine flour than he sold to the defendant in the same house, and of the same brands, to wit: two of Rose's and two of Pedlar's brand. Except this, the list corresponded exactly with the fine flour which the plaintiff had in Fisher's storehouse, both in number and brands. Between barrels of fine flour of the same brand there is no difference in price. On the morning of the twenty-first March, the warehouse accidentally took fire and was burned, together with the check for the price of the flour and the flour itself; the one hundred and nineteen barrels having never been separated from the four barrels of the plaintiff, nor the larger parcels belonging to others. The defendant, on the same morning, directed the cashier not to pay the four hundred and sixteen dollars and fifty cents. It is not the practice in Richmond for the keepers of storehouses to deliver flour in the rain, nor after dark; but this flour, if it had been called for on that evening, would have been delivered, and it could have been done, the storekeeper said, in an hour. It sometimes happens that flour, about to be delivered, wants cooperage, in which case the usage, well known to merchants is, that the cooperage is done by the storer, at the expense of the vendor; sometimes forty barrels in one hundred will want coopering; sometimes not one. It has been, and is the usage of storers in Richmond, well known to the merchants, to charge the vendor of the flour with the storage, and to deliver it to his

order whenever called for. The storer in this case would have delivered any flour of the plaintiffs to his order, on demand, though the storage was not paid, holding him responsible, and charging him with it. It has been, and is the common course of trade in Richmond, for flour in store to be sold by draft or order on the storekeeper, and to pass, by the transfer of the order, through many different hands without actual delivery of the flour to any.

We are to consider whether, taking all these facts as proved to the satisfaction of the jury, the court properly instructed them that the plaintiff ought to recover in this action, remarking by the way, that the instruction touches no matter of fact, but matter of law solely; that it does not speak of the recovery, as to amount, or quantity, but merely as to the right; "that the plaintiff, if they believed the evidence, had a right to recover," so that if he have a right to recover any part of his demand, the court was right, and it remained for the jury to settle the amount.

The great question is, to whom did the flour belong when burnt, for the owner must bear the loss. Was the contract so complete as to pass the property? We will consider this, first, upon the general principles which regulate contracts of sale; secondly, upon the usage found that flour passes from hand to hand, by the transfer of the order, without the actual delivery of possession.

1. To charge on a contract of sale, and put at the risk of the vendee, a constructive delivery is enough. An actual delivery, neither in law, nor in fact, is required. It is only necessary that it be such as to pass the entire right of property. A symbolical delivery, as the key of a warehouse where the goods are deposited, will pass them to the vendee: 1 Atk. 171; 1 East, 195; 3 Johns. 395. So, if the contract of sale be complete, though the goods continue in the warehouse where stored at the time of sale, under an agreement to be free of storage for a certain number of days, and during that time they be burnt, the vendee must bear the loss: *Phillimore v. Barry*, 1 Camp. 513. So, where the vendor has no further act to do, to ascertain the quantity, quality, or price of the article sold, the vendee must bear every loss by fire, etc. Though he could not withdraw the goods from the place of deposit, because the duties were not paid, the fact that they were not paid being proclaimed at the sale, and vendor being in no default for the non-payment between the sale and burning: *Hinde v. Whitehouse*, 7 East,

558. But if by the terms of sale there remains anything to be done by the vendor in order to render the goods deliverable, a loss subsequent to the sale, and prior to the doing of that act, must be borne by the vendor. If, therefore, weighing be necessary to ascertain the quantity: *Hansom v. Meyer*, 6 East, 614; or some casks remained to be filled up, to make them of one weight: *Rugg v. Minett*, 11 Id. 210; or the contents of bales are to be counted: *Zagury v. Firnell*, 2 Camp. 240; or it be the duty of the vendor to do any other act, for ascertaining the quantity, quality, or price of the article, it is for such part as is not ascertained, at his risk, though the remainder will be at that of the purchaser. See *Shepley v. Davis*, 5 Taunt. 617; *Busk v. Davis*, 2 Mau. & Sel. 397, and many other cases. All these go upon the ground that by the contract some essential act remained to be done by the vendor, as between vendor and vendee, to the completion of the contract, and whenever this is the case the property does not pass, but remains in the vendor, and at his risk.

The doctrine of stoppage *in transitu* must be cautiously applied to the case before us. It is established law in England, that if goods be consigned to a merchant, and when they reach him he has become bankrupt, they go to his assignees, though the consignor should remain wholly unpaid, and though when he consigned them, he considered his correspondents to be in good credit. The harshness and injustice of this principle is felt and lamented by the judges, and they go as far as they can in favor of an unpaid vendor. Thus, in *Hammond v. Anderson*, 4 Bos. & P. 70, Sir J. Mansfield, C. J., says: "The right of stopping *in transitu* is a favorable right which the courts of law are always disposed to assist." In *Scott v. Pettit*, 3 Bos. & P. 469, Lord Alvanley, who had tried the cause at N. P., says: "At the trial, I could not help forming the wish that the question how far the bankruptcy of Beckley had operated as a countermand of his previous orders to Messrs. Wallers should be considered by the court. But in looking into the cases, I find that question to be completely closed in Westminster Hall, and that we, therefore, are bound to hold, that though a bankrupt has altogether ceased to be a trader, his warehouse continues open for the purpose of receiving goods, and that the assignees have a right to take possession of everything that may come into their hands, without paying a single farthing, even though the consignors of the goods are not entitled to come in under the commission."

And Heath, J., says: "It is much to be lamented that goods consigned to a bankrupt, which arrive after the act of bankruptcy, as in this case, should ever be considered a part of the bankrupt's effects. The hardship to which this rule of law has given rise, in particular cases, was the occasion of introducing the doctrine of stoppage *in transitu*." It is not strange, that in their wish to restrict and mitigate this harsh doctrine, the judges should sometimes decide that goods are still *in transitu*, when, if the question were between two, equally innocent, which should bear the loss, they would, under the same circumstances, have decided that the possession was changed, and the vendee the owner. When the question of transit is decided against the unpaid vendor, we may safely take such a case as applying *a fortiori* to a question of mere risk. Let us now see how these general doctrines apply to our case. Two merchants, in the city of Richmond, come together; the one is a seller of flour, the other a buyer. The seller exposes his bill of parcels; here I have one hundred and nineteen barrels of fine flour, lying in Fisher's warehouse; these are the particular brands, and number of each brand; my price is three dollars and fifty cents per barrel, cash. The buyer says, I will take it. The amount is calculated, for which he gives a check on the bank. The seller, at the same time, gives him a bill of parcels, an order on the warehouseman, and a receipt in full for the price of the flour. Is not this a complete and executed contract? The money paid, and the flour delivered. That the check was made, and understood as a cash payment, none will doubt who recollects that since the institution of banks the merchants have used them as a place of deposit for their funds, and make all their money payments by checks on them.

The receipt in full, too, shows that the seller, at least, thought that he had gotten his money. It would seem strange, if in return he did not give the flour. An actual, manual delivery of it was, from the nature of the article, not to be expected; but fair dealing required that something equivalent should be done, and the vendee would hardly have paid his money without getting what he considered equal to an actual delivery; he got the order directing the warehouseman to deliver him one hundred and nineteen barrels of fine flour of specified brands. Excluding all subsequent events from our view, and looking at this contract as the parties did at the moment of making it, can we doubt for an instant that they considered it complete, that each party had done all that he had to do with it? And the inten-

tion of the parties, we know, is of the essence of contracts. This seems to me the common-sense, practical view of the subject, and it is fully supported by the law. A bargain struck, and payment of the purchase-money, vests the property of the chattel in the vendee: 2 Black. Com. 448. This was admitted in the case of a specific chattel, as a horse, but the principle is applicable to every case where the subject of the bargain is so designated as to be clearly distinguishable. Thus, in *Hinde v. Whitehouse*, Lord Ellenborough applies it to a sale of sugars at auction, which were afterwards burnt. In support of his opinion, he cites with approbation a passage from Noy's *Maxims*, 88, where it is said that "if I sell my horse for money, and the horse die in my stable between the bargain and delivery, I may have an action of debt for my money, because, by the bargain, the property was in the buyer." And it will be observed that in this case Lord Ellenborough lays great stress on the meaning of the parties, and "what was considered between them."

Phillimore v. Barry, 1 Camp. 513. This was a sale of rum, forming part of the cargo of a Danish prize, which was lodged in the warehouse of Fector & Minet, of Dover. The terms of sale were, a deposit of twenty-five per cent. to be paid immediately, and the remainder in thirty days, at the end of that time purchasers to take away the goods, or afterwards to pay warehouse rent. Thirteen puncheons of this rum, consisting of several lots, were bid for, and knocked down to an agent of the defendants for them. Before the thirty days elapsed, the warehouse caught fire, and by means of a quantity of gunpowder lodged in them were blown into the air. There was no evidence of the deposit being paid. The action was brought by the seller to recover the price of the rum. The first question was upon their statute of frauds, the seventeenth section of which requires a memorandum in writing in certain cases, in the sale of personal chattels in this differing from ours. Having discussed that point, Lord Ellenborough held that the property vested absolutely in the purchasers from the moment of the sale, and there was a verdict for the plaintiff. But it was contended that the case before us falls within that class of cases where something still remained to be done by the vendor to complete the contract, and therefore that the property in the flour did not pass, and this something, it is said, was the cooperage and the warehouse rent, both of which were chargeable to the vendor. But it must be remembered that that which remains to be done must be something essential to put the articles

sold in a deliverable state, and something, too, between vendor and vendee. As to the cooperage, it does not appear that any was wanting in this case, and if it was, the usage proved is that it was done by the storer at the vendor's expense. As to the warehouse rent, that formed no lien on the flour, for it is proved to be the usage to charge it, not upon the flour, but to the vendor, and "to deliver the flour to his order when called for."

Neither of these things, then, shows anything farther to be done by the vendor, nor any obstacle existing to the delivery of the flour. The vendee had only to present his order to the warehouseman, and the flour would have been rolled out to him without a moment's delay. The case of *Austen v. Craven*, 4 Taunt. 643, is not like this. That was trover for fifty hogsheads of sugar, of a particular description, to be delivered on board a British ship. The action failed, because the plaintiff could not prove that the defendants (who were sugar-refiners) ever had on hand the specified quantity and description of sugar sold; here it is in proof that every barrel of flour called for by the order was at the warehouse. Nor is this case like that of *Busk v. Davis*, 2 Mau. & Sel. 397. That was a sale of ten tons of Riga flax, lying at the defendant's wharf, at one hundred and eighteen pounds per ton. The flax was in mats, varying in quantity from three to five or six hundred weight. The quantity sold was to be ascertained by weighing by the wharfinger, and to make up ten tons might require the breaking up of the flax mats. Before payment for the flax, the vendee became bankrupt, and the vendor sent an order to the defendant, at whose wharf the flax still remained, not to deliver it. The assignees of the bankrupt brought trover.

Lord Ellenborough says: "The question in this case is, whether the property has been so ascertained as to be considered in law as effectually delivered, the order to deliver having been given to the wharfingers, and entered on their books. That would not, of itself, be sufficient, unless the flax were in a deliverable state, and if farther acts were necessary to be done by the seller to make it so. Here it appears that farther acts were necessary, for the flax was to be weighed, and the portion of the entire bulk to be delivered was to be ascertained; and if the weight of any number of unbroken mats was insufficient to satisfy the quantity agreed upon, it would have been necessary to break open some mats in order to make up that quantity. Therefore, it was impossible for the purchaser to say that any precise number of mats exclusively belonged to him." Observe the

striking difference between that case and ours. There the flax was put up in mats, and sold by the ton; to make up the number of tons sold, it might be necessary to break up some of the mats. Here, the flour was put up in barrels, and sold by the barrel; no further process necessary; no weighing, no barrel to be broken to make up the quantity. There, it was impossible for the buyer to say that any precise number of mats belonged to him. If he could have said so, the argument of the chief justice leads directly to the conclusion that the decision would have been different. Here, the vendee could say what precise number of barrels belonged to him; his order designated number and brand, precisely.

But I will now cite a case, which (if I mistake not strangely) will remove the objection; that there was no such separation here as would enable the vendee to designate any particular barrels as his property; an objection founded on the fact that there were in the warehouse, and belonging to Pendleton, two barrels of the Rose, and two of the Pedlar brand, which were not sold with the one hundred and nineteen. The case is *Jackson v. Anderson*, 4 Taunt. 24. Saddler, Jackson & Co. consigned to Fielding, residing at Buenos Ayres, goods to be sold for them. He sold the goods, and sent them an account of the proceeds, calculated in dollars, and annexed to the following letter:

"Gent.: Annexed I hand you an account of sales of four trunks; net proceeds, one thousand nine hundred and sixty-nine Spanish dollars, which amount I shall ship per the *Cheerly*, gun brig, Lieutenant Fullarton, who will sail direct for England, in ten or fourteen days," etc.

Some time afterwards the plaintiff received the following letter, brought by the ship *Cheerly*:

"Gent.: I have by this conveyance sent to my friends, Messrs. Laycock & Co., a bill of lading for a barrel of dollars,
J. F.

marked: —100, in which are included for you, on your account,
P.

count, one thousand nine hundred and sixty-nine dollars, which sum will be rendered to you by said gentlemen," etc.

On the receipt of this letter, the plaintiffs applied to Laycock & Co., and after being put off several times, were at length told that they had transferred the bill of lading to a friend. On further inquiry, they found that the barrel of dollars, on its arrival, had been deposited in the Bank of England, and that the bill of lading, indorsed severally by Fielding, Laycock &

Co., and the defendants, had been transmitted to the bullion office by the defendants, of whom the bank had purchased the dollars, and paid them the sum of one thousand and ninety-eight pounds thirteen shillings and nine pence, being the value of four thousand seven hundred and eighteen dollars, contained in the barrel, which sum the defendants carried to the credit of Laycock & Co., with whom they had an account as bankers. Upon this the plaintiffs demanded the one thousand nine hundred and sixty-nine dollars of the defendants, who refused to deliver them up, and thereupon they brought trover for them.

A verdict and judgment at *nisi prius* were taken for the plaintiffs for four hundred and eighteen pounds, eighteen shillings and nine pence, with leave to the defendants to move to enter a nonsuit. In support of the motion, it was urged by Shepherd and Vaughan, sergeants, that, admitting the barrel consigned to Laycock & Co. to be the same from which the one thousand nine hundred and sixty-nine dollars were intended to be appropriated to the plaintiffs, still there has not been any such appropriation of them as will entitle the plaintiffs to this form of action. The objection, they said, is that there has not been any act done in respect to the one thousand nine hundred and sixty-nine dollars, claimed by the plaintiffs, to separate them from the rest, so as to enable the plaintiffs to designate them as their own property; and when a demand was made, by the plaintiffs, of the dollars, if the defendants had desired them to point out which dollars were their property, they could not possibly have ascertained them, which shows that neither trover nor detinue will lie. This was the argument of eminent counsel, and it will be admitted that it was put in its most imposing form. What said the court? Its opinion was delivered by Mansfield, C. J. After disposing of the other objections, he remarks: "Another question has arisen from the intermixture of property. It appears that no separation was ever made from the whole quantity of one thousand nine hundred and sixty-nine dollars belonging to the plaintiff; and an objection has been taken on that ground against the form of action. But, we think, there is no difficulty in that point. The defendant has disposed of all the dollars, consequently he has disposed of those which belong to the plaintiffs; and as all are of the same value, it cannot be a question what particular dollars were his. It is not like the case of tenants in common, who have a right to a part of every grain of corn, etc. Here one has a right to a

certain number, and the other to the rest. If a man keeps all, and has no right to a part, the action lies for that part which he wrongfully detains."

Now, I ask, where is the difference with respect to separation between that case and this? If trover could be maintained for one thousand nine hundred and sixty-nine dollars, out of an undivided mass of four thousand seven hundred and eighteen dollars, would not trover equally lie for one hundred and nineteen barrels of flour out of one hundred and twenty-three? The dollars were not more alike than barrels of the same quality and brand. The dollars in the one case were consigned to Laycock & Co., and the bill of lading indorsed and delivered to them; in the other case, the barrels of flour were stored with the warehouseman. In the one case, a letter is written to the plaintiff, which is considered as an order on the consignee for one thousand nine hundred and sixty-nine dollars out of a barrel containing four thousand seven hundred and eighteen dollars; in the other, an order is given on the warehouseman for one hundred and nineteen barrels of flour, of particular marks and brands, out of one hundred and twenty-three. If trover could be maintained for the dollars, could it not equally for the flour? It was asked, suppose a part of the flour had been burnt, how would you have decided whose it was? I ask, suppose a part of the dollars had been stolen out of the barrel, whose loss would it have been? The very same difficulty is presented, yet we see that in the case of the dollars, the court did not perplex themselves with it, but going on the great principles of justice, sustained the claim of property. Observe, too, the ground taken, "as all (the dollars) are of the same value, it can not be a question what particular dollars were his." In our case it is expressly in evidence, that between barrels of the same brand and quality, there is no difference in price. May we not say here then, "As all the barrels were of the same value, it can not be a question what particular barrels were his?" Again, the chief justice says: "Here one has a right to a particular number, and the other to the rest." Did not the order in this case give the vendee a right to a particular number, one hundred and nineteen barrels? Yes; and the rest belonged to the vendor. Thus, I think I may fairly say that, leaving the custom out of the question, the case is with the plaintiff.

But surely the custom puts it beyond all question. "An established usage," says Chief Justice Gibbs, in *Lucas v. Dor-*

rien, 2 C. L. 105,¹ "constitutes the common understanding of parties in their dealings, and on the foot of that common understanding they are supposed to contract." See, also, Doug. 513, what Lord Mansfield says of a custom, even one year old, and see Starkie's Ev. pt. 4, 452-5. "The custom found is, that flour is sold by order, and passes by the transfer of the order, from hand to hand, without actual delivery of the flour to any." Now engraft this into the contract of the parties before us, and the question must be decided, unless you say that the parties could not make such a contract, that such an usage can not stand. And why should we say so? There is nothing illegal in it. The principal foundation of mercantile law is usage; and it has become law, because the courts, finding it established in practice, have respected it, and made it the rule of their decisions in mercantile cases.

That this usage is convenient, is proved both by its existence and the nature of the article. It saves the trouble to the merchant of going twenty times a day to the different warehouses to examine the different parcels of flour he had bought; for, under the usage, the order is a negotiable paper; the traders in flour look to the order only, and the flour passes by it from hand to hand; but the character of the paper is changed at once, and the usage destroyed, if you say that however exactly it describes the flour, that flour shall not pass, if there be any other like it in the warehouse; the paper will no longer pass by its face, but before any buyer will pay his money, he will go to the warehouse with the bill of parcels in his hand, and examine, not only to ascertain whether the flour described is there, but whether there may not be in the warehouse other flour of the same brand and quality. And why should we break up this usage, and impose this heavy clog on the commerce of the place? Especially, when in the case before us, it would have an *ex post facto* operation on the contract of the parties. It can not be denied that, under the usage, they intended an immediate change of ownership as to the flour, and consequently, that from the moment of such change, it should be at the risk of the vendee; but, after the flour is burnt, we say that the usage is a bad one, and shall not stand, and giving this decision a retrospective action, throw the loss upon the vendor.

To show the weight which the courts give to mercantile usage, I will refer to the subject of dock warrants, treated of in the following cases: *Spear v. Travers*, 4 Camp. 251; *Zwinger v.*

1. *Lucas v. Dorrien*, 2 Eng. Com. L. R. 362; S. C., 7 Taunt. 278; 1 Moore, 29.
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Samuda, 2 Com. 98;¹ *Lucas v. Dorrien*, Id. 105;² and *Keyser v. Suse*, 5 Id. 461.³

But, suppose that in the teeth of the contract, the usage and the cases cited, we say that no flour of Rose and Pedlar brands passed, because there were two barrels of each more than were sold. Still, as regards the flour of the Bent creek, Fredonian, Rocky creek, D. S. Garland, and Rockford brands, we must say that passed by the order, because all in the warehouse, of those brands and quality, were contained in the order, as in *Rugg v. Minet*, the court decided that the property passed to the vendee in all the casks that were filled up. And if the property in any of the flour passed to the vendee, the vendor had a right to recover for so much, however small the quantity; and the instruction of the court which we are discussing, and upon which the whole turns, was not wrong, for the court instructed the jury, that if they believe the evidence, the plaintiff had a right to recover in this action, not pretending to speak as to the amount of the recovery, but as to the form of the action; as to the law, not as to the facts.

Upon general principles, then, and also upon the usage, I am of opinion that all the flour in the order passed by it to the vendee, and that he must bear the loss; but if only a part passed, it is clear to me that the court did not err in its instructions to the jury. The judgment must be affirmed.

Judge CABELL. This was an action of assumpsit, brought in the superior court of law for the county of Henrico, by William G. Pendleton against Gabriel Ralston and Archibald Pleasants, merchants and partners, trading under the firm of Ralston & Pleasants, for four hundred and sixteen dollars and fifty cents, the price of one hundred and nineteen barrels of fine flour sold and delivered by Pendleton to Ralston & Pleasants. The suit abated as to Ralston, by the return of the sheriff, and was afterwards prosecuted against Pleasants only. The contract of sale was not denied by Pleasants, but his defense was that it was an executory contract only, and not a sale executed by delivery. That a delivery of the flour was necessary to make it an executed sale, is not denied. Nor is it pretended that there was an actual delivery. But a constructive delivery is as effectual as an actual delivery; and the question is, whether there has been such delivery in this case. The contract was for the sale of one hundred and nineteen barrels of fine flour,

1. *Zwinger v. Samuda*, 2 Eng. Com. L. R. 356; S. C., 7 Taunt. 265; 1 Moore, 12.

2. 2 Eng. Com. L. R. 362; S. C., 7 Taunt. 278.

3. S. C., 1 Noll Gow. 58.

of certain specified mill brands, which Pendleton then had stored in the warehouse of J. & J. Fisher, in the city of Richmond. The price was fixed at three dollars and fifty cents per barrel, to be paid in hand, amounting in the whole to four hundred and sixteen dollars and fifty cents. Ralston & Pleasants, as soon as the contact was entered into, gave to Pendleton their check on the Bank of Virginia for the amount of the purchase-money, and received from him a bill for the flour, and an order on J. & J. Fisher to deliver the flour to them. The order was in the following terms: "Messrs. John & James Fisher, jun. Gentlemen: Deliver to Messrs. Ralston & Pleasants one hundred and nineteen barrels of Richmond fine flour which are stored with you, of the following brands, viz., Pedlar, sixty-two barrels; Rose, two barrels; Bent Creek, seven barrels; Fredonian, ten barrels; Rocky Creek, twenty barrels; David S. Garland, thirteen barrels; Rockford, five barrels. Yr. mo. Wm. G. Pendleton. Richmond, March 20, 1820."

Pendleton actually had, at the time of the contract, in the warehouse of the Fishers fine flour, with which the order might have been strictly complied with. There was not, at that time, in the said warehouse any fine flour of the specified brands, other than that which belonged to Pendleton, nor had he there any fine flour of the specified brands, beyond what the order called for, except that he had two more of "Pedlar" brand and two more of "Rose" brand than the order required. But there is no difference whatever between barrels of fine flour of the same mill brand. "It is the common usage of trade in the city of Richmond, well known to the merchants thereof, for flour in store to be sold by draft or order on the store keeper, and to pass by that mode of transfer through many different hands, without actual delivery."

The storage due for the flour in this case was not paid by Pendleton, but "it is the usage of the store-house keepers in the city of Richmond, well known to the merchants, to charge the vendor with the storage, and to deliver the flour to his order, when called for;" and it is proved in this case that the flour would have been delivered on the day of sale, had it been called for, notwithstanding the storage had not been paid. It sometimes happens that flour, when about to be delivered, is found to require coopering; but in such cases it is the usage in the city of Richmond, well known to the merchants, for the cooperage to be done by the storer, at the expense of the vendor. It was insisted by the counsel for the appellant that there

can be no constructive delivery where anything remains to be done, as between the vendor and vendee, to put the property into a deliverable condition. And it must be conceded that the cases referred to by him fully established the principle. I will, however, take a hasty view of them, in order to show that the circumstances of those cases are materially different from this case. In *Hanson v. Meyer*, 6 East, 614, there was a sale of all a man's starch at a certain warehouse, at so much per cwt., and it was held that the sale was not complete to pass the property, because the starch remained to be weighed before even the price could be ascertained.

In *Wallace v. Breeds*, 13 East, 522, there was a sale of fifty out of ninety tons of Greenland oil, which was in casks. It was held that the property did not pass, because, according to the constant custom of the trade, the casks were to be searched by a cooper employed by the vendor, a broker also on behalf of both the vendor and vendee was to attend and make a minute of the foot dirt and water in each cask; and the casks were then to be filled up by the seller's cooper, and at his expense, so that they might be delivered in a complete state, containing the quantity sold.

In *Austen v. Craven*, 4 Taunt. 644, there was a sale of fifty hogsheads of sugar, of a certain quality, at so much per cwt. There were no hogsheads of such sugar in existence at the time of the contract. The hogsheads were to be filled, and then weighed before even the price could be ascertained. Held that the sale was not complete.

In *Busk v. Davis*, 2 Mau. & Sel. 397, there was a sale of ten tons out of eighteen tons of Riga flax, then lying at a certain wharf. The flax was in mats of different weights. It remained to weigh the flax before it could be in a situation to be delivered; and it would be necessary to break some of the mats to make up the precise quantity sold. I say nothing at present as to the right of the vendor to select the mats to be delivered. It was held that the sale was not complete, so as to pass the property. In *Shepley v. Davis*, 5 Taunt. 617; 1 Com. Law R. 211, there was a sale of ten tons out of thirty tons of hemp, at a wharfinger's. It remained to weigh the ten tons from the general mass before they could be delivered. Held, that the sale was not complete, so as to pass the property.

In *White v. Wilks*, 5 Taunt. 176; 1 Com. Law R. 64, there was a sale of twenty tons of oil, out of a merchant's stock consisting of several large quantities of oil, in divers cisterns, and in

divers places. It remained to measure, from the larger masses, the twenty tons sold, before they could be in a situation to be delivered. Here, also, I say nothing at present as to what cisterns the twenty tons should be taken from. The sale was held not to be complete to pass the property. Thus, in some of these cases, it remained to ascertain even the price of the thing sold; and in all of them it remained to measure or to weigh the thing sold before it could be delivered. In the case at bar nothing remained to be done for ascertaining the price or amount of purchase-money; that was fixed by the terms of the contract itself, and the thing sold required neither to be weighed nor measured.

But it is contended that this case resembles *Wallace v. Breeds*, and comes within the influence of the general principle as to the thing sold not being in a deliverable situation, because the flour might require some coopering. But, in *Wallace v. Breeds*, it was certain at the time of the sale that the thing sold was not then in a situation to be delivered; it was certain that it required the agency of a cooper to put it into that state; and the cooper was to be selected by the vendor. In this case no agency of a cooper may have been necessary. It is only sometimes that flour in store requires any coopering; and when it does, the cooper is not then to be selected by the vendor; for the usage of the trade, and consequently the implied contract of the parties, provides that the coopering, when any is necessary, shall be done by the warehouseman, without any farther act to be done as between vendor and vendee. The coopering under this usage ought not to be considered as an act necessary to complete the sale, but merely as an act to be done at the convenience and at the future request of the vendee. It is to the interest of the vendees that it should never be done till the flour is actually called for. And the acts of the parties in this case would seem to show that they so considered it. Ralston and Pleasants gave their check for the purchase-money, intending it as full payment, in the same manner as if the sale were complete; and Pendleton insisted on no stipulation, fixing the time for delivering the flour, which he probably would have done had it been considered that the flour was yet to be delivered, and that in the mean time it was at his risk.

But it is contended that the property did not pass by the sale in this case, because the specific flour sold was not ascertained as to identity and individuality, by an actual separation of it from the other flour with which it was mixed in the warehouse.

This objection can not, I presume, be intended to apply to any of the flour sold, except to that of the Pedlar and Rose brands. As to all the flour of the other brands, there was no other flour of those kinds in the warehouse, except the precise numbers mentioned in the order. Consequently, their identity and individuality were as fully ascertained as if they had been actually delivered. The objection, however, does apply to the flour of the Pedlar and Rose brands, there being two barrels of each of those brands more than the numbers called for in the order. And the question is, whether that circumstance shall prevent the sale from passing the property in the flour of those brands. It is true that Chief Justice Mansfield said, in *Austen v. Craven*, and in *White v. Wilks*, that the actions could not be supported, because the contracts of sale under which the property was claimed, attached to no specific quantity of oil in the one case, or of sugar in the other.

And in *Busk v. Davis*, Lord Ellenborough, and some of the other judges, spoke of the necessity of ascertaining the identity and individuality of the property. But it should always be borne in mind that the expressions of the judges must be construed in reference to the circumstances of the cases to which they are applied. *Austen v. Craven*, was the sale of fifty hogsheads of sugar of a particular quality, which were not in existence at the time of the contract; and if they had been in existence, yet as hogsheads of sugar are of no prescribed weight, it would have been necessary to weigh them before the sale would be complete. *White v. Wilks*, was the sale of a smaller portion of oil out of divers larger quantities. It was not only uncertain from which of the larger quantities the portion sold was to be taken; but if they had been ascertained, still the part sold was to be separated by measuring it from the larger quantity with which it was mixed. *Busk v. Davis* was the sale of a quantity of flax, out of a much larger quantity lying in mats at a certain wharf. The sale was for so many tons, not so many mats; besides, the mats were of unequal weights. It was necessary to weigh the quantity sold, and to break some of the mats to get the precise quantity sold, before the article sold could be delivered.

In cases like these, where portions of a larger mass, liquid or solid, are sold, and where the portion sold must be weighed or measured (which of necessity includes the idea of separating them from the general mass), it may be said that the identity and individuality of the part sold must be ascertained by actual separation from its kindred residue, before the sale will be

complete to pass the property; or, in other words, before there can be a constructive delivery. But it by no means follows that the same principle applies to cases where the things sold are not portions of a larger mass, to be separated by weighing or measuring; but consist of divers separate and individual things, all precisely of the same kind and value, mixed with divers other separate and individual things, which are also of the same kind and value, and between which and the things sold there is no manner of difference whatever. There is no case of this kind to which the principle has been applied. On the contrary, it has been decided, that in such cases no actual separation is necessary, even to support the action of trover. Thus in *Jackson and another v. Anderson*, 4 Taunt. 24, J. Fielding, in Buenos Ayres, put four thousand seven hundred and eighteen Spanish milled dollars into a barrel, and consigned them to Laycock & Co., of London, with directions to deliver one thousand nine hundred and sixty-nine of them to Jackson & Co., that being the sum in which Fielding was indebted to them for goods consigned by them to him, and sold on their account. Laycock & Co. did not deliver the one thousand nine hundred and sixty-nine dollars to Jackson & Co., but assigned the bill of lading for the barrel of dollars to Anderson, who sold all the dollars to the Bank of England. Jackson & Co. brought trover against Anderson for the one thousand nine hundred and sixty-nine dollars.

The defense was precisely the same as that made in *Austen v. Craven*, *White v. Wilks*, and *Busk v. Davis*, viz., that the action of trover would lie only for specific property, and that the identity and individuality of the dollars sued for had never been ascertained by actual separation from the others with which they were mixed. The defense, however, was overruled, and the plaintiff obtained judgment on the ground expressly stated by Chief Justice Mansfield, "that as all the dollars were of the same value, it could not be a question which particular dollars were his." This remark applies to and is decisive of the case before us; for it is expressly stated in the record, that between barrels of fine flour, of the same mill brand, there is no difference whatever. Nor is it material that the property, in the case of *Jackson v. Craven*, was claimed under a bill of lading, and in the other cases, under a contract of sale. The action was trover in all the cases, and there was no great necessity for showing the identity and individuality of the property in the one set of cases, than in the other; yet, the action was supported in the

case where the things sued for were individual things of the same value, mixed with others of the same kind and value; and was not supported where the action was not for individual things of the same kind, but for a portion of a larger mass, liquid or compound, which requires to be weighed or measured.

It is farther contended for the appellant, that it was necessary to count the barrels before they could be delivered, and that the sale could not be complete to pass the property until they were counted; but I have not found any adjudication which countenances the idea that the necessity to count the things sold will produce that effect in cases where the things sold are individual things of the same value with each other, and with those with which they were mixed, and where the counting is not necessary for ascertaining the amount of the purchase-money. In the case before us, the things sold were individual things of the same value; so far, at least, as relates to the flour of the same brand; and no counting was necessary for ascertaining the amount of the purchase-money; that was fixed by the terms of the contract itself. The barrels, it is true, were to be counted; but so they must be in cases where a certain number is sold at an agreed price, and where there are no more in the warehouse than the number sold. But, in such cases, they are counted merely to see that they are in the warehouse; and it would not be contended, I presume, that the necessity for counting in such cases, would prevent the property from passing. I admit, that if the sale had not specified the number of barrels, but had been of all the flour in the warehouse, or of all the flour of any particular brand, at so much per barrel, such a sale would not pass the property until the barrels were counted; because the counting would be necessary in that case for ascertaining the amount of the purchase-money; and no sale can be complete till that is ascertained.

I am of opinion, that the usage of trade stated in the record, for flour in store to be sold by mere draft or order on the warehouseman, and to pass through many hands before it is called for, is entitled to great consideration. For commercial law rests principally on usage, and the usages of trade are presumed to enter into the contemplation of the parties to a contract, and they are supposed to contract on their basis.

Upon the whole, I am of opinion that there was a constructive delivery of the flour, which completed and executed the sale, and passed the right of property to Ralston and Pleasants. The flour, therefore, being theirs, was at their risk, and the loss

of it by the accidental burning of the warehouse must fall on them, and not on Pendleton; and as the check given on the Bank of Virginia for the purchase-money did not avail Pendleton as a payment, the check itself having been consumed by fire, and the payment of it countermanded by Ralston and Pleasants, I think Pendleton is entitled to recover the purchase-money in this action, and that the judgment should be affirmed.

The **PRESIDENT**. In considering this case, I have examined all the cases cited at the bar, and also some others that were not noticed. It is a settled rule of the common law, that property in personal chattels passes only by actual delivery of the thing, except in cases in which some equivalent delivery is agreed upon by the parties, or is established by custom or usage, in which a virtual delivery is substituted for actual delivery of the thing. But, in these cases, unless the thing was in a condition to be delivered without more to be done by the vendor, either as regarded the price or the quantity, as there could be no actual delivery until that was done by the vendor, so there can be no virtual delivery equivalent to it. And all the cases on the subject appear to me to have been turned on the inquiry, whether, from the nature of the subject, it was or was not in a deliverable condition, that is, without more to be done by the vendor affecting the price or the quantity of the thing to be delivered. From some of the cases, it might be inferred that identity of the thing was a prerequisite to a virtual delivery of it; and, I think, there can be no doubt it is so in every case in which the price or quantity is to be affected by what remains to be done to ascertain it. But in a case in which identity is a matter of total indifference, both to the vendor and vendee, either as regards price or quantity, it is certainly of no importance.

It is impossible to suppose, upon the facts stated in the bill of exceptions, that if Pendleton, the vendor, had separated the one hundred and nineteen barrels of flour from the one hundred and twenty-three, in pursuance of the terms of the order; that when he came to those of Pedlar's brand, or Rose's, it was of the slightest importance to him, or to the vendors, which two barrels of each brand were left out, as exceeding the number stated in the order; all of the same brand being of equal value, and being integral quantities. They were in a deliverable condition, without more to be done by the vendor which could affect either price or quantity. Every thing necessary to be done, to give to the vendees the actual possession of the flour,

could be done by the keeper of the warehouse as well as by Pendleton, and the order under the custom, which is stated in the bill of exceptions, I think, virtually passed the possession of the one hundred and nineteen barrels to the vendees. The case of *Whitehouse v. Frost*, 12 East, 614, went a step farther than this. In that case ten tons of oil were sold, and an order given to deliver it to the purchasers, out of forty tons then lying in one cistern in the oil-house in Liverpool; there was nothing to distinguish the ten tons from any other ten tons of the forty in the cistern; there was nothing like identity, quantity and price were alone ascertained; all the particles of the oil were mingled together in one mass; there were no integral quantities of equal value, distinct and separate from the whole mass, of which actual or virtual delivery might be made, until the oil was measured out, and the ten tons separated from the mass; this could not be predicated of it, and yet the court held that the property passed to the vendees. I know that this case was condemned by many of the judges afterwards, as having gone too far; but it is clearly distinguishable from the one before us. When that case was pressed upon the court in the case of *Craven v. Austen*, 4 Taunt.,¹ Heth, Justice, asked if ten tons had leaked out of the cistern, to whom would they be deemed to belong; and Mansfield, C. J., in delivering the opinion of the court, said it was unlike other cases, and must stand on its own bottom.

In the case of *Busk v. Davis*, 2 Mau. & Sel., ten tons of flax were sold, to be taken out of eighteen tons put up in mats; the order for it had been accepted and entered in the wharfinger's books, but that, Lord Ellenborough said, was not sufficient; further acts were necessary, for the flax was to be weighed and the portion of the entire bulk to be delivered was to be ascertained, and it might be necessary to break open some mats to make up the quantity agreed upon. If in that case the flax had been in mats of equal quantity and value, the first ascertained by the inspection of a public officer, and the latter by the facts in the case, as in the case of the flour, it is not to be inferred from the language of Lord Ellenborough, or any other judge, that it would have been held that the property did not pass; but the contrary.

The case of *Jackson and another v. Anderson and another*, 4 Taunt., is a case in which identity of the thing in which property was claimed by the plaintiffs was not pretended. The one thousand nine hundred and sixty-nine dollars consigned to

1. *Austen v. Craven*, 4 Taunt. 644.

Jackson & Co. by Fielding, the shipper, were never separated from, nor counted out from the four thousand seven hundred and eighteen dollars shipped to Laycock & Co., and transferred by them to Anderson, and yet it was held that the property in the one thousand nine hundred and sixty-nine dollars passed to Jackson & Co., the plaintiffs, and that they could maintain trover for them. They were separate quantities of the same value, and were as little distinguishable from other dollars in the same barrel as the sixty-two barrels of flour of Pedlar's brand; and the two barrels of Rose's brand, from what would remain of those brands, in the case before us. In that case they held that the property passed, though the bill of lading would have been satisfied by the delivery of any dollars to the amount of one thousand nine hundred and sixty-nine, and property in any specific one thousand nine hundred and sixty-nine dollars, could not be said to be vested in the plaintiffs. The order for the flour in our case could not have been satisfied by the delivery of any flour, even of the same inspections and brands, except that which was in the warehouse when that order was given; from that moment the one hundred and nineteen barrels of fine flour, of the marks and brands specified in the order, became the property of the vendees; all that was material to them was that the flour described in the order was in the warehouse, to be counted out to them when called for. If the vendor had not owned another barrel there except the one hundred and nineteen barrels specified in the order, it could not be doubted that his property in the one hundred and nineteen barrels passed to the vendees, though it might have to be counted out of flour of the same description, belonging to others. As it has not been questioned that the flour of all the brands described in the order, except Pedlar's and Rose's, passed to the vendees; that sixty-two barrels of the first and two of the latter were to be counted out of sixty-four in the one case, and four in the other, can not vary the case; whether it was to be counted out of flour belonging to others, or to the vendor, was not material.

The rule, I know, has been laid down, that where anything remains to be done to ascertain the price, the quantity, or the thing, the property does not pass. In the case before us, price and quantity were ascertained; and as to the thing, nothing more is meant than the kind of thing, wherever from the nature of it it can not be identified and distinguished from things of the same kind and value, as in the case of the dollars in *Jackson v. Anderson*, and of the flour in the case before us.

With regard to the coöperage, which might not be necessary, and the price of storage, as it was the custom to charge both to the vendor, neither can affect the question.

I think, therefore, that the instruction of the judge to the jury was correct, and that the judgment must be affirmed.

COALTER and GREEN, JJ., absent.

DELIVERY TO PASS TITLE IN CHATTEL.—As to the sufficiency of a constructive delivery of chattels, see *Jewell v. Warren*, 7 Am. Dec. 74. Concerning transfers by delivery of bills of sale or lading, see *Buffington v. Curtis*, 8 Am. Dec. 115. The principle, that if anything remains to be done by the seller before delivery the title does not pass, was applied in *Davis v. Hall*, 14 Am. Dec. 373.

TRUSS v. OLD.

[6 RANDOLPH, 566.]

POSSESSION IS INDISPENSABLE to maintain trespass *quare clausum fregit*.

GUARDIAN'S POSSESSION OF WARD'S LAND.—Guardians in socage and statutory guardians in this state have possession of the land of their wards, and they, and not their wards, must bring trespass for injuries thereto.

CUTTING TREES ON AN INFANT'S LAND BY THE GUARDIAN'S PERMISSION is not trespass, and the ward can not maintain an action therefor, even after the guardianship has terminated, but must look to his guardian for compensation.

TREES CUT ON LAND HELD TEMPORARILY by another become personal property, and belong to the owner of the inheritance, and he may bring trover for their removal.

GUARDIAN MAY SELL TREES CUT OR THROWN DOWN on his ward's land, and if any wrong is done he must compensate the ward, who can not bring trover against the purchaser.

MISCONCEPTION OF ACTION IS NOT CURED BY VERDICT under our statute of jeofails, where the verdict itself is objected to as given under a misdirection.

SUPERSEDEAS to a judgment of the superior court of Norfolk county. The action was trespass *quare clausum fregit* brought by James Old, an infant, suing by Wilson, his guardian and next friend, against the defendant, for cutting and carrying away certain pine trees growing on the infant's land. Plea, "Not guilty," with liberty to prove anything that might be proved under a plea of accord and satisfaction. It was proved by the defendant, in substance, that the trees in question were cut and carried away by permission of one Kedar Old, the plaintiff's guardian, legally appointed and qualified by the county court of Norfolk; the defendant having contracted with the said

guardian to pay their value, the guardian stating that he needed some money to pay for his ward's schooling, etc.; and that the defendant afterward, and before the decease of the said guardian, paid him in full for the said trees. The court instructed the jury that the guardian had no authority to grant liberty to the defendant to cut and carry away the said trees; that notwithstanding such license the cutting was trespass and the action was well brought, and that the payment made to the guardian was no satisfaction or defense, to which instruction the defendant excepted. Verdict and judgment for the plaintiff. The defendant prayed this court for a *supersedeas* to the said judgment, on the ground: 1st. That the guardian in this country has power to sell timber from his ward's land, and the proceeds may well be considered profits of the estate; 2d. That if not, the guardian by granting permission to cut timber is guilty of waste, and he alone is responsible; 3d. That at all events the license by the guardian is a complete bar to the action of trespass. *Supersedeas* awarded.

Leigh, for the appellant.

Stanard, for the appellee.

GREEN, J. Possession is indispensably necessary to support an action of trespass, *quare clausum fregit* (see the cases collected, 20 Vin. Abr. 463, pl. 9, 12, 13, 14); and whether an infant can maintain such an action for a trespass done to his lands whilst he is in the wardship of his guardian, depends on the question whether, in point of law, the possession is in the guardian or ward. Our statute concerning guardians recognizes only two descriptions of guardians who have any power over the property of their wards; guardians in socage, and those appointed by the father under that statute, who are put, in all respects, upon the footing of the former, our statute in this respect being a copy of the statute of 12 Car. II., c. 14. Under that statute it is been held that, although the statutory guardian and guardian in socage have no beneficial interest, yet their authority is coupled with a legal interest, and is not barely an office: *Shaftsbury v. Shaftsbury*, Gilb. 172; *Eyre v. Shaftsbury*, 2 P. Wms. 102, S. C. It is an interest like that of a trustee for the separate use of a married woman, an executor in trust, or an administrator of an estate of which there is no surplus, after the payment of debts, all of whom have a legal, without any beneficial interest. When we consider the purposes for which the law appoints guardians to infants it is obvious that to enable them

to effect the objects of their appointment, they must have a legal right to the exclusive possession and control of the infant's property so long as the guardianship continues, without which they could not manage the property beneficially for the infant, as by renting or cultivating, and disposing of the produce of their lands, hiring their other property, and selling that which is perishable and which might otherwise be wholly lost. The infant being incapable of making any contract in respect to these subjects, his guardian could not make a valid contract in his name, and must of necessity transact all in relation to his ward's property in his own name.

Accordingly the authorities are uniform that a guardian in socage has a legal right to the possession and disposition of his ward's land during the continuance of his wardship. Littleton, b. 2, sec. 123, takes this for granted by stating that when the guardianship terminates the ward may enter and oust the guardian. So the guardian in socage may justify the occupation of the land against the heir himself: Kelw. 46, b. He may grant a copyhold in reversion or remainder in his own name, as *dominus pro tempore*: 2 P. Wms. 122; *Shopland v. Ryoler*, Cro. Jac. 55, 99. He may sue and avow in his own name: 2 P. Wms. 122. He may make a lease for years during the wardship, upon which an ejectment may be maintained: 14 Vin. Abr. 185, pl. 4; and see *Id.* pl. 3, 6, and cases there cited. He may have an action of trespass against a stranger for spoiling the grass in the socage lands, in his own name, and not in the name of his ward: Br. Trespass, pl. 175; Br. Garden, pl. 5; cited in Vin. Abr. 196, pl. 3, note. He may have a writ of right of ward, and recover the land and damages as well as the body of the ward: 14 *Id.* 190, pl. 1, 2. He may have an ejectment of ward, and if the ward himself enters and ousts him of the land he may recover it by a writ of intrusion of ward: Br. Eject. Custod. pl. 11, cited 14 Vin. Abr. letter n, pl. 1, note. And to the same effect was the civil law, from which the law of guardianship in socage was in a great degree taken. "*Tutores sive pupillorum, sive ipsi possident, possessorum loco habentur.*" Dig. lib. 2, c. 15, sec. 5.

If the defendant in this case had entered and cut and carried away the trees without the license of the guardian, the ward could not have maintained the action of trespass. That would have belonged to the guardian, who must have accounted to the ward for the damages recovered. But being done by the permission of the person legally in possession, there was no tres-

pass whatever. It was argued that the trees being a part of the inheritance whilst standing, became, when severed from the soil, personal property belonging to the ward, for which he might have maintained trover, and that the misconception of the action is cured after verdict by our new statute of jeofails. The statute of jeofails gives that effect to a verdict only when the verdict is given without exception, but here the objection is to the verdict itself, as given under a misdirection of the court, and if improperly given, can not cure an error. Besides, although it is true that when timber trees growing on lands held temporarily by another, are cut or thrown down by tempest or otherwise, they become personal property belonging to the owner of the inheritance, for which he may maintain trover against any one who takes them, even the tenant: *Uvedale v. Uvedale*, 15 Vin. Abr. 142, pl. 3; yet in this case, the plaintiff could not have maintained such an action against the defendant, because the moment the trees became personal property the guardian had a legal right to sell them, as being perishable and of no value but as a subject of sale. The wrong, if any, done to the plaintiff must be compensated by the guardian, the judgment should be reversed, and the verdict set aside, and a new trial awarded, in which the instruction excepted to is not to be given if again asked for.

The PRESIDENT and JUDGE CABE concurred.

CABELL and COALTER, JJ., absent.

POSSESSION OF REALTY TO MAINTAIN TRESPASS.—See *White v. St. Guirons*, 12 Am. Dec. 56. As to the possession necessary to maintain trespass for taking or injury of chattels, see the note to *Orser v. Storme*, ante, 543.

HETH'S EXECUTOR v. WOOLDRIDGE'S EXECUTOR.

[6 RANDOLPH, 605.]

PAROL VARIATION OF WRITTEN CONTRACT CONCERNING LAND.—A written contract for the sale of land varied by parol in a material particular will not be enforced in equity, as where the written contract requires the vendee to search for coal, and if he finds it in paying quantities within a given time, to pay an increased price for the land, and the time for the search is afterwards extended by parol.

APPEAL from the court of chancery of the Richmond district
The opinion states the case.

Johnson, for the appellant.

Stanard, for the appellee.

CARR, J. On the twenty-ninth day of July, 1807, Thomas Wooldridge sold to Thompson Blunt, by a contract under the seals of the parties, a tract of land lying in the county of Chesterfield, and containing one hundred and twenty-eight acres, for the sum of two thousand dollars, payable one half on the twenty-fifth of December, 1807, the other half on the twenty-fifth of December, 1808; and it was farther agreed that Blunt was to commence, in the month of July, 1808, to search upon the land for coal by sinking shafts or boring with bore rods, for the purpose of speedily finding the same, and to continue such search from time to time as his convenience and the state of the weather will permit, until the first of July, 1809, and to be guided in his sinking and boring by said Wooldridge or his agent, at his, said Blunt's, sole expense, and if within the time aforesaid, that is to say, before the first of July, 1809, the said Blunt should find a good and sufficient body of coal to work on said land, in that case said Blunt binds himself to pay to said Wooldridge, or his assigns, four thousand dollars for said land; that is to say, two thousand dollars in addition to the bonds already given.

In November, 1807, Blunt, having sold out his bargain to Henry Heth, gave written directions to Wooldridge to convey the land to him, which was accordingly done. No coal was found within the time stated in the contract. Wooldridge died in 1814. About the middle of July, 1820, Heth found on the land a valuable body of coal. In the early part of the year 1821, Heth died. In April, 1822, this bill was filed by the executor of Wooldridge against the executor of Heth. It states the written contract, and makes it a part of the bill. That Heth was a purchaser with full notice, having drawn the agreement; that under the agreement some slight attempts were made to find coal; but that Heth being very anxious to employ his hands in working other pits, at his instance it was agreed between him and Wooldridge that the search should be postponed till a more convenient time, and the said Heth agreed that if at such future time at which the search should be prosecuted, or at any time, a good and sufficient body of coal to work should be found on said land, the said augmented price of two thousand dollars should be paid. The bill then states the subsequent finding of the coal, the death of Heth; that by his will he subjected his lands to be sold by his executor; that Randolph qualified, sold the land, and became the pur-

chaser; that by the second contract, the augmented price became a charge upon the land; and prays a decree for the money, and a sale of the land in defect of payment.

The executor of Heth answered, averring that both Blunt and Heth, being exceedingly anxious to find coal as soon as possible, commenced searching for it immediately after the twenty-ninth of July, 1807 (before Blunt was required by the contract to do so), in conformity with the directions of Wooldridge, which search was pushed on, by sinking a shaft with the utmost vigor, till Christmas, 1807; that in the spring of 1808, the sinking of the shaft was resumed by Heth, and pushed on with like energy until December, 1808, when it was suspended in despair of finding coal there; that several years after, a European collier of reputation explored the direction of the coal in the adjoining land which had been worked for years, and revived the hope that coal might probably be found in the said shaft; that some time after this, the sinking of the shaft was again resumed, and was carried on from time to time until it was sunk many feet deeper in July, 1820. He positively denies the change of the first agreement by a second, stating many reasons for disbelieving it, and relying on the statute of frauds and perjuries as a defense. Evidence on both sides was taken, the cause came to a hearing, and the chancellor decreed that the additional price be paid, and that unless such payment be made within six months, the land be sold to raise the money. From this decree the appeal is taken. The first question respects the statute of frauds. "No action shall be brought whereby to charge any person upon any contract for the sale of lands, tenements, and hereditaments, etc., unless the promise or agreement, etc., or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized."

Having in the case of *Anthony v. Leftwich*, 3 Rand. 238, given my opinion on the general policy of this statute, and the mischiefs which, in my mind, have followed its relaxation by courts of equity, I shall make no further remarks on that subject. With respect to parol agreements for the sale of lands, I believe the courts have never gone farther than to say, that wherever such agreement has been so far executed that a refusal of full execution would operate a fraud upon a party, and place him in a situation which did not lie in compensation; then a specific execution would be given, provided the contract was clearly established. Before we come to the application of this statute,

we must determine the nature of the contract relied on by the plaintiff. That it is a contract for the sale of land, all must agree. Is it a written or parol contract? Or, is it a written contract varied by a subsequent parol contract, which the plaintiff seeks to set up and enforce? The plaintiff states the written contract for the sale of the land, and makes it a part of his bill. This is a perfect contract, and as to the claim of the additional two thousand dollars makes that depend on the finding coal before the first of July, 1809; but it is most clear that this additional sum is not claimed by the bill under this contract; and equally clear that, if it had been, it could not be recovered; for it is admitted on all hands that no coal was discovered for eleven years after the time which this contract limits for its discovery. The bill states that there was a subsequent agreement as to the time of search for the coal and the payment of the additional two thousand dollars; but this is neither stated nor proved as an independent agreement; indeed, it would be unintelligible unless connected with the written contract, nor would it be at all less exposed to the operation of the statute, nor the mischiefs which it was intended to remedy, by taking it as standing by itself.

The truth, as it seems to me, is, that this is a bill relying on the written contract to show that by the terms of sale Blunt was bound to seek for coal twelve months before the first of July, 1809, and if found in that time was to pay two thousand dollars more, and relying on the verbal agreement to show that the parties subsequently changed these terms of the written agreement, Wooldridge agreeing to let Heth off from searching within the time limited, and Heth agreeing that he would resume the search when convenient, and would pay the additional two thousand dollars if at any time coal should be found. Can a party in equity enforce a written contract thus varied by parol? The mischiefs intended to be remedied by this part of the statute were the frequent perjuries committed in swearing to parol agreements set up by persons with whom none such had been made. To countervail such proof, if admitted at all, would generally be impossible, because the parties would take care so to fix the time and place of such agreements as to have no other witnesses present; and then the negative was out of the reach of proof. The legislature, therefore, thought that the only cure for the evil was to take away entirely, to cut up by the roots, all parol agreements for the sale of lands.

Courts of equity have narrowed this somewhat by their doc-

trine of part performance; but still it is settled law that a naked parol agreement for the sale of land is void, yea, even if the defendant, by his answer, acknowledges the agreement precisely as stated, provided he at the same time pleads the statute: 2 Bro. Ch. Cas. 564; 1 Id. 416; 4 Ves. 23; 6 Id. 12; 2 Hen. Bl. 63. Is the attempt to vary this written contract by parol within the mischiefs of the statute? Let us look at the circumstances. The written contract was made in 1807; the parties, with great particularity, set down all the terms and conditions of their agreement. Fifteen years after this, and after Wooldridge and Heth were both dead, this bill is filed, claiming the augmented price of the land under this parol variation of the contract. How is the new agreement proved? By the testimony of a single witness, William Wooldridge, who had been appointed executor of Wooldridge, the vendor, had qualified, and had afterwards been disqualified, without which he could not have been a witness in the cause. Did he hear the contract made? No; but in the latter part of the year 1808 he met Heth on the road, and Heth, in a casual conversation, told him of the new arrangement between himself and Wooldridge; no other person present. Nor is there another witness who speaks of having heard from any quarter the slightest intimation of this change of the written contract. The witness gives his evidence in 1824, and speaks, from memory solely, of a conversation accidentally held upwards of fifteen years before, a conversation in which he had no interest to impress it on his memory; and the import of which may have been materially changed, by a slight misunderstanding in the delivery, or misgiving of memory, in the recollection of it. Nor is there, in the nature of things, any possible check, except the statute, upon any misstatement of his, whether accidental or willful. When I speak thus, no one can so far misunderstand me as to suppose that I mean a personal reflection. The witness stands upon the record perfectly fair in his reputation, and so I take him. But we can make no distinction, for the law has made none; and I am supported by the law and the authorities when I say that this case presents, in a strong point of view, the very mischiefs which the statute meant to prevent.

These remarks equally apply, whether we consider this as an independent, unconnected, parol contract about the sale of land, or an attempt to enforce a parol variation of a written contract for the sale of land. The latter, as I have said, strikes me as the true point of view. Many cases might be cited to

show that a written agreement can not be varied by parol, but the law is too well settled to require it. I will only cite one: *Jordan v. Sawkins*, 3 Bro. Ch. Cas. 388; 1 Ves. jun. 402. A lease was agreed by writing to be granted of a house for twenty-one years, to commence from April 21, 1791, and it was afterwards agreed by parol that the lease should commence June 21st, instead of April 21st. To a bill filed by the tenant for a specific performance of the written agreement, varied by the parol agreement, the statute of frauds was pleaded, and Lord Thurlow held that the different period of commencing the lease made a material variation, as it gave the estate from the owner for so many months longer, and therefore he allowed the plea. The variation attempted in the case before us is of much more importance; it goes to double the price of the land. Is there any such part performance of this alleged parol contract as will take it out of the statute? The books say that an agreement will not be considered as partly executed unless the acts done are such as could be done with no other view or design than to perform the agreement, and if it do not appear but that the acts done might be done with other views, the agreement will not be taken out of the statute. The bill in the case before us states no such act, nor does the evidence disclose any such. If it be said that the suspension of the search for coal was such act, the answers are: 1. That this is no act, but merely a forbearance to act, which is laid down to be wholly insufficient; 2. The party might suspend the search, because he chose to break his covenant and answer for such breach at law; or, 3. He might suspend the search, because he considered that he had complied with his contract by searching twelve months, which there is a good deal of evidence to show he might well think he had done. There is, then, no act of part performance. There were several other points made, of which I take no notice, because the ground on which I have placed the case is perfectly conclusive to my mind that the decree should be reversed, and the bill dismissed.

The PRESIDENT and Judge COALTER concurred.

CABELL and GREEN, JJ., absent.

COLEMAN v. COCKE.

[6 RANDOLPH, 618.]

ISSUING ELEGIT AFTER FI. FA.—Under our statute relating to executions, a creditor may sue out an *elegit* on his judgment or decree after a *fi. fa.* returned satisfied in part only, without prosecuting the *fi. fa.* to a return of "*nihil*" as to the residue.

CONVEYANCE TO A SON BY A FATHER who is deeply indebted, made without a valuable consideration, is fraudulent as to creditors who obtained judgments against the father after the conveyance was made.

FATHER PURCHASING LAND AND TAKING DEED IN SON'S NAME.—Where a father, being deeply indebted, purchases land and has the conveyance made to his son, who gives no consideration therefor, the transaction may be impeached for fraud by a creditor of, or purchaser from, the father.

GIVING AWAY AN EQUITABLE ESTATE to a child, by a father who is largely indebted, is as much a fraud as the conveyance of the legal title under similar circumstances would be.

PERSONS ACQUIRING TITLE BY FRAUD ARE TRUSTEES for the injured party.

WHERE THERE ARE TWO DECREES ON THE SAME DAY against a defendant's land, the whole, and not a moiety, should be directed to be sold, for each would take a moiety if they were extendible at law.

BONA FIDE PURCHASER FROM FRAUDULENT GRANTEE.—Where a conveyance is fraudulent as to creditors of the grantor, but the grantee subsequently conveys to a *bona fide* purchaser for value, who has no notice of the fraud, the latter will be protected against the creditors of the prior fraudulent grantor.

SUCH PURCHASER'S FAILURE TO RECORD HIS CONVEYANCE does not impair his right, where his grantor's interest attached before the contesting creditor procured his judgment.

APPEAL by Coleman and William A. Bentley from a decree rendered against them and other defendants in the Richmond superior court of chancery. The bill was filed below by Cocke and wife and Elizabeth Ronald, to set aside sundry voluntary conveyances made by William Bentley, father of William A. Bentley, to the said William A. and his other children; and also a conveyance made by the said William A. to the defendant Coleman, on the ground that at the time of the said conveyances, the said William Bentley was largely indebted to the wife of the plaintiff Cocke and to the said Elizabeth Ronald for moneys which as their guardian he had received and squandered, and failed to account for, and that the plaintiff's wife and the said Elizabeth had obtained decrees against the said William Bentley, on February 19, 1819, for the payment of the sums claimed by them. Three executions of *fi. fa.* had been issued on these decrees, March 8, 1819, one in favor of Cocke and wife for the sum due her; one in favor of Elizabeth for the amount due

her; and a third in favor of all the plaintiffs for the costs. The last was satisfied in full, and the others in part only, but there was no return of *nulla bona*, as to the residue. After the answers were filed, proofs were taken, and the chancellor made a decree pronouncing fraudulent and void the conveyances named in the bill as having been made to the several defendants by William Bentley, and subjecting the property conveyed to the payment of the sums due the plaintiffs. From that decree this appeal was taken. The facts relating to the conveyances under which the appellants claimed, and which alone are material to the present controversy, as well as the questions raised on the appeal are stated in the opinion.

Leigh, for the appellants.

Johnson and Stanard, for the appellees.

By GREEN, J. The appellees, having obtained decrees against William Bentley, filed their bill against him, and many persons holding personal and others holding real property, some of them directly, and others indirectly, under him; the object of which was to set aside the conveyances as being fraudulent as to them, and to subject the property thereby conveyed to the satisfaction of their claims.

The counsel for Coleman, who holds a part of the land in question, urged as an objection to the jurisdiction of the court, that at the time when the bill was filed, the plaintiffs had not a capacity to sue out *elegits* on their decrees, without taking some further preliminary step to enable them to do so, and consequently had not then a subsisting lien on their debtor's land; that not being the effect of a judgment only *per se*, but of the capacity to extend it by *elegit*, and that a creditor at large, having no lien on his debtor's land, can not claim the aid of a court of equity, in order to enable him to reach it by removing impediments to his proceedings at law. This objection, if well founded, would lead to the dismissal of the bill as to the relief sought, in respect to all the lands mentioned in it.

The objection is founded on the decision of this court in *Eppes v. Randolph*, 2 Call, 125, and a recent decision of Chief Justice Marshall, to the same effect, in which it was held, that a judgment-creditor could not overreach in equity a *bona fide* conveyance of his debtor's land made after the judgment, and at a time when the capacity to sue out an *elegit* was suspended in consequence of no execution having been sued out within the year, and no election entered on the record, or for any other cause.

These decisions proceeded upon the merits of the respective cases, and not upon the question of jurisdiction, and whether right or wrong, do not touch the case under consideration, either in respect to the question of jurisdiction, or upon its merits; for here all the defendants were purchasers before the date of the decrees, and are charged to have purchased fraudulently. And in all the cases upon the subject, in the English court of chancery, it seems to have been the uniform course to consider a judgment with a capacity to acquire the right to sue out an *elegit* by *scire facias*, or otherwise, as such a lien as gave jurisdiction to the court, whenever other circumstances justified its interposition. And in no case has there ever been any inquiry whether the judgment had been kept alive by taking out execution within the year, or otherwise, or whether it had been actually revived or not, in the case of the death of either party, unless from some cause (for instance, the great lapse of time), it was doubted whether the party could revive his capacity to sue out an *elegit* by reviving his judgment, as in the case of *Burroughs v. Elton*, 11 Ves. 29.

However all this may be, I think it clear that at the time when this bill was filed, the plaintiffs had an existing capacity to sue out *elegits* upon their decrees, without any preliminary proceeding whatever. They had taken out executions of *feri facias*, which had been levied, and returned in part satisfied by the sale of the property taken, without any return of *nihil* as to the residue. And in such a case, it is contended that the plaintiff could not take out an *elegit*, without first taking out a new execution of *fi. fa.*, and having it returned *nihil*, upon the ground that upon the just construction of our statute concerning executions, it was required that a party electing to resort to one species of execution, could not resort to one of another description, until he had exhausted the effect of the first, by pursuing it to a return of *nihil* or *non est inventus*; and, especially, that upon the literal terms of the state, an *elegit* could not be taken out after a *fi. fa.* or *ca. sa.* returned, unless the return was *nihil*, or *non est inventus*.

This leads us to a particular examination of our statute, the first section of which provides, that all "persons who have, or shall hereafter recover any debt, damages or costs, in any court of record, may, at their election, prosecute writs of *feri facias*, *elegit*, and *capias ad satisfaciendum*, within the year, for taking the goods, lands and body of the debtor." It then prescribes the teste and return days, and the forms of those executions.

and of their returns. The third section provides, that "when any writ of execution shall issue, and the party, at whose suit the same is issued, shall afterwards desire to take out another writ of execution at his own proper costs and charges, the clerk may issue the same, if the first be not returned and executed, and where, upon a *ca. sa.*, the sheriff shall return that the defendant is not found, the clerk may issue a *fi. fia.*, and if, upon a *fi. fa.*, he shall return that the party hath no goods, or that only part of the debt is levied, in such case it shall be lawful to issue a *ca. sa.* upon the same judgment, and where part of a debt shall be levied upon an *elegit*, a new *elegit* shall issue for the residue, and, where *nihil* shall be returned upon any writ of *elegit*, a *ca. sa.* or *fi. fa.* may issue, and so *vice versa*, and where one judgment is obtained against several defendants, execution thereon shall issue, as if it were against one defendant, and not otherwise."

The fourth section enacts the provisions of 32 Hen. VIII., c. 5, which provides, that if a tenant by *elegit* be evicted, he may have *scire facias* against the debtor, his heirs, executors and administrators, and have such executions for the residue of his debt unpaid, as if no execution had theretofore issued, enlarging the provisions of the English statute, in this, that whilst that only allowed a new *elegit*, ours allows a new execution of any sort. The next three sections enact the provisions of the 16 and 17 Car. II., c. 5, declaring that an extent shall not be avoided on account of the omission of any lands which were extendible. The eighth and ninth sections enact the provisions of the 21 Jas. I., c. 24, authorizing a new execution against the lands and tenements, goods and chattels of a debtor dying in execution, except such lands and tenements as have been *bona fide* sold for the payment of some other creditor, and the proceeds so applied.

The thirteenth section enacts the provision of 29 Car. II., c. 3, declaring that goods shall be bound by a *fi. fa.* only from the time of the delivery to the sheriff.

The twenty-eighth section provides, that a debtor in execution may relieve his body, by surrendering goods to be sold as if taken under a *fi. fa.*, provided that if they be not sufficient to pay the debt, or are subject to a lien, a new *fi. fa.* or *ca. sa.* may issue. These are all the provisions which touch the question under consideration.

The argument, that a party having once made an election to take one species of execution, can not afterwards resort to another till that elected is exhausted by a return of *nihil* or not

found, proceeds upon the idea, that such is the effect of the first section giving such election, or the consequence of the particular provisions of the third section, according to which, in every case (except one in which a new species of execution is allowed to be resorted to), the former is supposed to be first returned *nihil*, or not found; and so in the twenty-eighth section, in which a *fi. fa.* or a *ca. sa.*, but not an *elegit*, is allowed after a debtor has been discharged upon the surrender of property, which proves sufficient to pay the debt incumbered. And the other suggestion, that the literal terms of the statute allowing a *ca. sa.* or *fi. fa.* after an *elegit* returned *nihil*, and so *vice versa* forbids an *elegit* after a *ca. sa.* or *fi. fa.*, unless they be returned *nihil* in the one case, and not found in the other, proceeds upon the idea that our statutes have abrogated the common law in respect to executions, and contain in their own provisions all the laws in force upon that subject, none of which propositions appear to me to be sustainable. And if not, then upon common law principles connected with the statutes giving the *elegit* the latter execution might issue after a *fi. fa.* in part satisfied, although not returned *nihil*, as was decided in the case of *Berry v. Wheeler*, 14 Car. II.; 1 Siderfin, 91.

The statute of Westm. 2, 13 Edw. I., c. 18, which gave the *elegit*, is nearly in the language of ours: "When debt is recovered or acknowledged in the king's court, or damages awarded, it shall be from henceforth in the election of him that sueth for such debt or damages, to have a writ to the sheriff *fieri faciat* of the lands *levari facias*: 2 Inst. 395, and goods *fi. fa.*: 2 Inst. Id., or that the sheriff shall deliver to him all the chattels of the debtor, saving only his oxen and beasts of the plow, and the one-half of his land," etc. At this time, the writ of *ca. sa.*, in the case of a private person, was only allowed in cases of trespass *vi et armis*, when the *capias in process* laid. It was afterwards extended to other cases, by allowing the *capias ad respondendum* to them.

The early constructions of the statute of Westminster, proceeding on the maxim that "*electio unius est exclusio alterius*," determined that when the creditor had elected one species of execution, he could never resort to any other, although that elected proved ineffectual. Thus, in 20 Edw. II., Execution, 132, it was held that after a *ca. sa.* awarded, although it was returned "not found," no other execution could afterwards issue; and so in 19 Hen. VI., it was held, that after an *elegit* prayed and entered on the record, the party could not resort to any other

writ of execution, because he had made his election; and in the early cases there are many instances of the like construction. But this rigorous and, to creditors, mischievous construction, gradually gave way to a more liberal spirit in the courts of justice, favoring the remedies of creditors, and, in some instances, in which the contrary principle had become so fixed as to be beyond the power of the courts, the legislature interposed in their favor, as in the instances of the statutes of Hen. VIII, Jac. I. and Car. II., incorporated into ours. And when our statute of 1726, the prototype of the present, so far as the question under consideration is concerned, was passed, this principle of construction was almost wholly, and soon after was entirely repudiated, and the doctrine fully settled, that a creditor might take in succession all sorts of execution, as long as it appeared that his judgment was not and until it was fully satisfied, unless indeed some execution had been levied which had such a tendency to satisfy, as that there was no criterion by which to ascertain for what sum a new execution should issue; as a *ca. sa.* executed, or lands extended under an *elegit*. Our statute of 1726, so far from intending to abolish the common law, and English statutes in force here, in respect to executions, and to return to the strict doctrine of election which had prevailed in ancient times, was, I think, designed to declare that the common law and English statutes, prior to the 4th of James I., were still in force here and to be continued, and to adopt, not only the liberal construction of the courts in favor of creditors, as far as they had then gone, but the statutes in the same spirit which had been passed since our colonization. Accordingly it recites that by the common law of England, and divers acts of parliament, which are binding on the people of this colony, all creditors might, at their election within the year, prosecute executions of *fi. fa.*, *ca. sa.* and *elegit*; and professes only to prescribe the forms of those executions, and their returns, in order to produce uniformity in practice. And whilst it omits to enact the statute of Westm. 2, which gave the *elegit*, and that of 32 Hen. VIII., giving remedy to tenants by *elegit* evicted, as being already in force, it enacts *verbatim* the other English statutes, now incorporated in our statutes, which passed subsequent to the 4th James I., which had no force here till so re-enacted. And the preamble to the section which enacted those provisions, which are now in the third section of our present act, declared that they were enacted for the purpose of "removing all scruples which may be entertained amongst clerks concerning the issu-

ing of executions;" and in giving directions concerning the issuing of executions, the act conformed to the most liberal decisions which had then taken place in favor of creditors. Thus, the first provision, that the plaintiff might have two executions of different kinds in the hands of the sheriff, provided he had only one executed, was contrary to the ancient principle of election, but in conformity to the then very recent decision (in 1725) of *Stamper v. Hodson*, 8 Mod. 302. So, as to the second provision, allowing a *fi. fa.* after a *ca. sa.* returned "not found," which was in conformity to the decision in *Hob. 57*. So, as to the third, allowing a *ca. sa.* after a *fi. fa.* returned "*nihil*," or in part satisfied, which was according to *Carr v. Copping*, 4 James, cited 11 Vin. Abr. 38, pl. 5. So, in the fourth case, of an *elegit* allowed after an *elegit* in part satisfied; that agreed with the decision in the case of *Glasscock v. Morgan*, 14 and 15 Car.; 1 Lev. 92. And so, also, in the fifth case, of a *ca. sa.* or *fi. fa.* after an *elegit* returned "*nihil*," that was in conformity with the determination in *Andrews v. Cope*, 15 James I.; cited *Hob. 57*; 11 Vin. Abr. 42; Execution, y. a. And so, in the sixth case, of an *elegit* after a *ca. sa.* returned "not found," or a *fi. fa.* returned "*nihil*," that agreed with the more ancient cases of 30 Edw. III. 24 and others. And the last provision, directing executions to issue against several, as if there were but one defendant, pursued the decision in *Rosser v. Welch & Kemmis*, Godb. 208; 11 Jas. I.; 11 Vin. Abr. Execution, x. a. pl. 19.

Considering, then, the general spirit and objects of this statute, I can not conceive that it was the intention of its framers to deprive creditors of remedies by execution which they would have had if the statute had not been made. And even if these statutes were considered as containing the whole law of executions, I should say that a right to take an *elegit* after a *fi. fa.* in part satisfied, and not returned "*nihil*" as to the residue, would fall within the spirit, and be sanctioned by the equity of the statutes. All the defendants claiming lands directly under William Bentley, are volunteers, and the deeds under which they claim grossly fraudulent, and the decree as to them correct.

The case is different as to the lands claimed by William A. Bentley and Coleman, indirectly under him, in respect to which the facts are these: In 1796, or 1797, William Bentley purchased of Wm. A. Cocke upwards of eleven hundred acres of land, with an agreement that no deed was to be made until he had given bond and security for the purchase-money. Wm. A.

Bentley was then, and probably long after, an infant. In August, 1805, Wm. A. Cocke, at the instance of Wm. Bentley, conveyed this land to Wm. A. Bentley, who paid no valuable consideration for it to any one. Wm. Bentley had not then paid the whole purchase-money, or secured it to Cocke, but afterwards paid it to him. In 1800, James Cocke and Wm. Bentley exchanged lands, Cocke giving him one hundred and fifty-four acres adjoining the land sold by Wm. A. Cocke to Bentley, at the price of one thousand pounds, and Bentley giving Cocke about eight hundred acres in Amelia, at seven dollars and fifty cents per acre. A considerable part of the difference was paid by James Cocke to William A. Bentley, by order of his father, William Bentley. In December, 1806, James Cocke, at the instance of William Bentley, conveyed the one hundred and fifty-four acres of land to Wm. A. Bentley, who paid no valuable consideration to any one for it. In May, 1807, Wm. A. Bentley conveyed to his brother, Peter E. Bentley, six hundred acres of these two tracts of land, by a deed reciting that their father had purchased the lands from the Messrs. Cocke, who had conveyed them to him at the instance and by the permission of William Bentley, who particularly enjoined it upon him to convey the six hundred acres to Peter E. Bentley, and this is the only consideration stated, and no other was given by Peter E. Bentley to any one. In July, 1813, Peter E. Bentley conveyed five hundred and twenty acres of this land to Coleman, for the consideration of something more than six thousand dollars, and in October, 1815, William Bentley and his wife, with a view to bar her claim to dower, conveyed the same land to Coleman by a deed reciting that William Bentley had purchased the land of Cocke, but had not procured any conveyance to himself, or in trust, and had given it to Peter E. Bentley and Wm. A. Bentley, his sons, to the last of whom Cocke had conveyed the land at his request, who especially enjoined it on Wm. A. Bentley to convey to Peter E. Bentley all that part of the land which lay above the bridge road. At this time Coleman had paid only about three-fourths of the purchase-money to Peter E. Bentley, but afterwards paid the balance, before, as he says in his answer, he had any notice of the fraud charged upon the Bentleys by the plaintiffs.

At the several periods when all these transactions took place, William Bentley was largely indebted as their guardian to the female appellees, who, in August, 1806, chose new guardians, and in November, 1807, instituted the suit against William

Bentley for the settlement of his accounts as their guardian, in which they obtained the decrees, in 1819, which are the foundation of this suit.

In 1807, and early in 1808, Bentley conveyed the residue of his estate, real and personal, without any valuable consideration, to his other children, and in September, 1811, took the oath of an insolvent debtor. None of the deeds under which Coleman claims, from those of the Cockes to Wm. A. Bentley, inclusive, were duly recorded. This fact was not charged in the bill, but being urged at the hearing, time was given to inquire into it, and the fact afterwards admitted to be so.

If the legal title to these lands had even been in William Bentley, and were claimed under him by direct conveyances from him, made under the circumstances accompanying the transfer of his equitable title to Wm. A. Bentley, his deeds would clearly be void for fraud, so far as Wm. A. Bentley was concerned, and even in respect to Coleman, if he had notice of the fraud. Some doubt seems at one time to have existed upon the question whether if a father or husband purchase lands in the name of his child or wife, or in his own name, causing in either case a conveyance to be made to the wife or child, the transaction could be impeached by a creditor of, or purchaser from, the husband or father, upon the ground of fraud, inasmuch as in such case there is no resulting trust for the husband or father, as in the case of a purchase by one, and a conveyance to a stranger.

In *Lady Gorge's case*, cited Cro. Car. 550, as decided in the 10th of Car., a father having purchased in the name of his daughter, and afterwards sold to another, it was held in the king's bench that unless there were some fraud discovered it was not within the 27th Eliz., though there be many badges of fraud.

In *Back v. Andrew*, Prec. Ch. 1; 2 Vern. 120 (1689), a father purchased copyhold, which was conveyed to himself and his wife and daughter, and their heirs. This was held to be an advancement for the wife and daughter, and not a trust for the husband, and that a mortgage by him should not bind the lands in the life-time of the wife and daughter.

In *Fletcher v. Sedley*, 2 Vern. 490 (1704), Wright, lord keeper, inclined that a lease purchased by A., and conveyed to B., in trust for A. during his life, and afterwards for C., who lived with A. as his wife, and was so reputed, was not assets of A., nor liable after his death to his creditors; for when a man pur-

chases, he may settle as he pleases, and thought that fraudulent conveyances are made so only by the several statutes made for that purpose.

In *Proctor v. Warren*, Selden's Cases in Lord King's time, 78 (1729), Lord King said, that he did not know that it had ever been determined, that if a man indebted, intending to provide for his children, has an estate originally conveyed to them, it should be subject to his debts.

On these cases, which are all that I have met with tending to establish the proposition that such a transaction can not be impeached for fraud, I remark, that in *Lady Gorge's case*, and that of *Back v. Andrew*, no fraud appears to have been established, and the declarations of Keeper Wright and Lord King, in the other cases, were mere *dicta*, upon which no judgment was founded.

The case of *Stileman v. Ashdown*, as it can be collected from the Reports of Atkyns, vol. 2, p. 477, and Ambler, p. 13, appears to have been thus: The father purchased lands, which were conveyed, in 1700, jointly to himself and one of his sons, and their heirs, and other land, which, in 1708, was conveyed jointly to himself and another of his sons. The dates of these purchases are not noticed. They were probably cotemporaneous with the conveyances. The father was also entitled to an equity of redemption of an estate mortgaged to one of his said sons. In 1721, a creditor of the father obtained a judgment against him. The father continued in possession of these lands until his death, in 1735, when his sons entered upon the estates respectively conveyed to them jointly with their father. The executor of the creditor filed his bill against the sons, for satisfaction out of the mortgaged and purchased estates. In 1742, Lord Hardwicke decreed that the plaintiff might redeem the mortgage; in which case the mortgaged premises should be sold, and the money paid for the redemption of the mortgage refunded, and then the judgment, and the costs at law and in equity, satisfied. And if the sales of the mortgaged premises should not be sufficient to satisfy the whole of the plaintiff's demands, that then a moiety of each of the estates, conveyed jointly to the father and his sons respectively, should be sold, and the balance due to the plaintiffs paid out of the proceeds ratably and proportionately, and the surplus paid to the sons respectively. But, if the sales of the whole property should not be sufficient to pay the whole of the plaintiff's demands, the court reserved the consideration of the rents and profits of

the two moieties directed to be sold. Upon a rehearing, in 1743, upon the petition of the plaintiff, who considered himself aggrieved in that the decree did not subject the whole of the purchased lands, and all their rents and profits to his demands, the decree was affirmed.

In this case, the whole of the purchased lands, conveyed jointly to the father and sons, was considered, so far as the creditor was concerned, as belonging to the father, but as between the father and the sons respectively, and as between the sons as belonging to the latter, according to the conveyances. A moiety was condemned to satisfy the plaintiff's demand, not because the father was entitled by the conveyances to a moiety, for in that case the right of survivorship in the sons, which they insisted on, would have been preferable to the lien of the judgment on the father's moiety (*Lord Abergaveny's case*, 6 Co. Rep. 79), but because, considering the father as entitled to the whole, so far as the creditor was concerned, yet only a moiety could be subjected in equity, since no more could have been reached at law, if it had been a legal estate.

Lord Hardwicke, as reported by Atkyns, argued that although a purchase by a father, in the name of a child, in general, imported an intention to advance the child, and prevented the implication of a trust for the father, such as would arise in the case of a conveyance to a stranger, yet that a conveyance, jointly to the father and child, was not calculated to effect the object of an advancement, and left it doubtful whether it was so intended; a suggestion which contradicted the express decisions in point in *Scroope v. Scroope*, 1 Ch. Cas. 27; 15 Car. II.; and *Back v. Andrews*, before noticed, and the subsequent decision in *Dyer v. Dyer*, noticed in 1 P. Wms. 112, note; and I am persuaded that Lord Hardwicke's judgment did not proceed on that ground; for if, as between the father and children, respectively, there was a trust for the father, and therefore, and for that reason only, the property liable for his debts, then, for the same reason, the surplus of the sales, after satisfying the debt, would have been decreed to be paid to the eldest son, as heir at law, and who was a party, whereas the decree was precisely such as must be made in the case of all fraudulent conveyances, setting them aside so far as to let in the claims of creditors, and leaving them to have full effect as between the parties. And that this was the ground of the judgment, appears by Lord Hardwicke's concluding observation: "It is not necessary that a man should be actually indebted at the time he enters into a

voluntary settlement, to make it fraudulent; for if he does it with a view to his being indebted at a future time, it is equally so, and ought to be set aside." And Sugden, in his *Treatise on the Law of Vendors*, p. 424, justly considers this as the ground of the judgment, "the settlement being considered as voluntary, and fraudulent against creditors." And after showing that the case of a joint conveyance to father and child can not be distinguished from that of a conveyance to the child only, but that in both cases, as between the parties, it should be considered as an advancement, he adds: "Fraud is, of course, an exception to every rule."

Thus, we have against the dicta of Keeper Wright and Lord King, the express decision of Lord Hardwicke, in *Stileman v. Ashdown*, and the implied admission in *Lady Gorge's case*, that a purchase by a father, and a conveyance to a child, may be impeached for fraud, either by a creditor of, or purchaser from the father. And so in *Christ's Hospital v. Budgin et ux.*, 2 Vern. 683, it was said that a purchase in the name of a wife or child after marriage, and voluntary, may, perhaps, be fraudulent as against creditors, in like manner as if the settlement was of property actually vested in the husband or father. And deplorable, indeed, would be the imbecility of the law, if it could not reach such a case as that under consideration. Here the father purchased in his own name, and not in the names of his children; he held the property, in one instance, as his own ten years, and in the other six, not only apparently, but as the real, beneficial owner of the property. He was then largely indebted, and any creditor who could then have had a judgment against him might have subjected that property to the payment of his debts, either under our statute, making uses and trusts liable to the charges and debts of the *cestui que trust*, or upon the original principles of a court of equity, which, following the law, will, in general, give such relief against equitable estates of the debtor, as might be had at law, if the estate was legal. The beneficial estate was settled in the father, and it was as much a fraud to give away to a child this beneficial interest, to the prejudice of his creditors, as to have conveyed away the legal title in like manner if he had it. If such a transaction could not be held to fall within the statute of frauds, I should think it might be well reached by the general principles of equity, according to which the Cockes were trustees for William Bentley. And although a conveyance by them to his son, with William Bentley's assent, would, as between the parties, extinguish the trust.

and the son would hold the land exempt from it, yet a court of equity might well hold, that by reason of the fraudulent intent of this transfer, the existing trust for William Bentley should not be thereby destroyed, but should still subsist so far as creditors were concerned; upon the ground that persons acquiring a title by fraud, are held to be trustees for the injured person, although they certainly did not intend to acquire the property in that character.

The decree was, therefore, right also as respects the lands held by William A. Bentley, and has properly directed the whole, and not a moiety only of the lands held in subject to satisfy the demand of the appellees, to be sold, since there were several decrees on the same day; each of which would have taken a moiety of the lands, if they had been extendible at law.

As to Coleman, I think he must be considered as a *bona fide* purchaser, for valuable consideration, without notice of the fraud, and, therefore, protected against the operation of the statute of frauds by its proviso. And as to the lands held by him, the only question is, whether they are liable to the claims of Bentley's creditors, on account of the deeds under which he claims not being duly recorded. Upon the fullest consideration, I am of opinion that they are not. So far as Coleman is concerned, we are to consider the case as if William A. Bentley had given to his father an adequate valuable consideration for the transfer of his interest in the lands purchased from the Cockes, and that the transaction was tainted by no fraud. The equitable interest of the father was not transferred to the son by the execution of deeds to him by the Cockes, but by the previous authority given by him to them to execute those deeds. And if such an authority had been given by letter, and the deeds never made, a *bona fide* purchaser of the equitable interest from William A. Bentley would have had a better right now to call upon the Cockes for their conveyance of the legal title, than any creditor of William Bentley getting a judgment against him after the transfer of his equitable right to his son. Such a transfer was valid without deed, and was not necessarily to be recorded to make it available against his creditors. The deeds from the Cockes passed, not Bentley's equitable title, but their naked legal title only, and if void so far as to leave that title still in them, yet those deeds, together with the other evidence in the cause, would be full proof that William Bentley's equitable right was transferred to his son; and in respect to Coleman, we must take

it to have been done, as before said, *bona fide*, and for valuable consideration; so that, if we held the deeds to be void, it would not avail the appellees anything.

The decree, as to Coleman, should, therefore, be reversed, and the bill dismissed, and in all other respects affirmed.

The PRESIDENT, and Judges CABELL, COALTER and CARR, concurred.

VOLUNTARY CONVEYANCES.—The cases on this subject in the American Decisions are cited in the note to *Hudnal v. Wilder*, 17 Am. Dec. 755.

DECISIONS
OF THE
GENERAL COURT
OF
VIRGINIA.

WHITEFORD *v.* COMMONWEALTH.

[6 RANDOLPH, 721.]

MURDER IN THE FIRST DEGREE.—A premeditated design to kill need not exist for any particular length of time to constitute murder in the first degree. Hence, if the defendant, coming in view of the deceased, formed the design to kill, and walking towards him immediately executed that design without any recent provocation, it is murder in the first degree.

KINDS OF HOMICIDE SPECIFIED IN THE STATUTE as constituting murder in the first degree, do not exclude other kinds of willful, deliberate, and premeditated killing.

INTERPOLATION OF "SUCH" BEFORE THE WORDS "WILLFUL, DELIBERATE, AND PREMEDITATED," in the statutory definition of murder in the first degree, is improper.

SECOND DEGREE.—Homicide perpetrated through criminal carelessness, but not from willful design, is murder of the second degree.

APPLICATION for a writ of error to reverse a judgment of conviction against the petitioner, of murder in the first degree for the killing of one Anderson. The facts are stated in the opinion.

Samuel Taylor, for the petitioner.

Attorney-general, for the commonwealth.

By Court, BROCKENBROUGH, J. The petitioner was indicted for the murder of William Anderson by shooting him with a gun. The jury convicted him of murder in the first degree, and he was sentenced to be hanged. During the trial, the jury, having retired to consult of their verdict, were for some time unable to agree, and came into court to ask of the judge to instruct them. He did accordingly instruct them, and the prisoner, by his counsel, excepted to the court's opinion, and it is

that opinion which is now to be reviewed. He said to them, "that to constitute murder in the first degree, with reference to this case, there must be a premeditated, or previously formed, design to kill, but it is not necessary that this premeditated design to kill should have existed for any particular length of time. It is only necessary that it should be a course determinately fixed on before the act was done, and not brought about by provocation at the time of the act, or so recently before as not to give time for reflection; neither is it necessary to prove this formed design by positive evidence; like every other fact, it may be established by circumstantial evidence, which, beyond rational doubt, convinces the minds of the jury that this previous determination to kill did in fact exist. If the prisoner, as he approached the deceased, and when he first came in view of him, at the distance of about fifty yards, then formed the design and came to the determination to kill the deceased, and in pursuance of this design walked in a quick pace the said distance of fifty yards, and killed the deceased without any provocation then received, it was murder in the first degree."

Murder is defined to be the killing any reasonable creature in being, "with malice aforethought, expressed or implied;" and there can not be any doubt that, at common law, if one man kills another with a previously formed design to kill, it is murder, although the design may have been formed only the moment before the fatal act is committed; and if there be no provocation whatever given at the time of the act, or if the provocation be very slight, and the act be committed with such weapon as is calculated to produce death, or if there have been a provocation so long before the act as that the blood has had time to cool and the mind to reflect, and the deadly purpose is then effected, it is murder. But it is urged by the counsel for the prisoner that such a killing is not murder in the first degree; that the legislature have enumerated particular cases which constitute murder in the first degree; thus, that murder perpetrated by means of poison, by lying in wait, or by duress of imprisonment or confinement, or by starving, or by willful, malicious and excessive whipping, beating, or other cruel treatment, or torture, is murder in the first degree; that a general provision is then made that murder, by any other kind of willful, deliberate, and premeditated killing, shall be murder in the first degree: 1 Rev. Code, 616; and it is argued that the word *such* ought to be interpolated so as to make it "any other *such* kind of willful, deliberate, and premeditated killing;" and that

without such interpolation the previous particular enumeration was unnecessary.

We do not see the propriety of that interpolation. We do not think that the intention of the legislature, or the interest of society, requires that the judiciary should interpose a word which the legislature have not thought proper to use. They have enumerated some of the most striking instances of deliberate, cruel, and premeditated homicide; but finding that a particular enumeration of all the instances which may happen in the ever-varying circumstances in which men are placed, would be impracticable, they have by general words declared that all kinds of willful, deliberate, and premeditated killing shall be murder in the first degree. The inquiry, then, always must be, Is the killing willful, deliberate, and determined on before the act? If it is, it proves that degree of malice which places the act in the highest grade of the offense. If a man willfully and deliberately points a pistol, or a gun, which he knows to be loaded with powder and ball, at another's head or heart, fires it, and kills him, not having received any provocation from him, surely there is as much malignity in his heart, there is as little excuse for him, and there is evidenced as willful, deliberate, and premeditated a purpose to kill, as if he had waylaid him, or had imprisoned him, without intending to kill. So, if there had been a previous provocation, but sufficient time had passed off to allow his blood to cool, and his reason to resume its influence, then the deliberate act of shooting down his adversary with the determined purpose to kill him, is murder from malice aforethought. Every act of murder which the jury are satisfied is of the character mentioned in the general clause, must be murder in the first degree, although the preparation for the fatal act may not have been so long present to the mind, nor the means of producing death so long protracted, as in enumerated cases.

There are many instances in which the act would not be considered so willful, deliberate, and premeditated as to make it murder in the first degree; yet it would be murder at common law, and, therefore, by the statute, would be considered as murder in the second degree. If a workman throws a stone, or a piece of timber from a house, in a populous city, into the street, where he knows people are passing, and gives them no warning, and kills a man, it is murder; yet, if it is from criminal carelessness, instead of a willful design to kill, or do great bodily harm, it is murder in the second degree. So, if a per-

son shoots at a fowl with the felonious intent of stealing it, and kills a person, he is guilty of murder, but it wants the ingredient of a willful killing, and, therefore, is only in the second degree. But these are acts very different from those which the instruction supposes.

The latter part of the instruction seems to have been intended to apply to the very case then before the court. It may be supposed that when the judge said that if the prisoner, when he first saw the deceased at a short distance, then formed the design of killing him, and in pursuance of that design, stepped up to him, and shot him, "without any provocation then received," that he was guilty of murder in the first degree; and that he did not, in his instruction, provide for the case of a provocation recently before that time received; so recently that there was no time for reflection, nor for the blood to cool. If this part of the instruction stood alone, we should question its correctness; but it would not be treating the court fairly to separate it from its context. It must be taken in connection with the first part of the instruction. The judge had almost in the same breath explained the effect of a recent provocation, and the latter part is explained by the former part of the instruction. We see no error in the opinion given.

The other error suggested in this record, to wit, that the judgment was rendered after the term of the court had been legally ended, has been fully considered, and just decided in *Mendum's case*, and the reasoning of the court need not be now repeated.

The court is unanimously of opinion that there was no error in the instruction given; and a large majority is of opinion that the second error assigned is not tenable.

The writ of error is, therefore, refused.

STATUTORY DIVISION OF MURDER INTO DEGREES.—The common law recognizes no distinction between the different kinds of murder. In most of the states and territories of the United States, however, motives of humanity have led to a separation of this offense into two degrees, only one of which is punished capitally: Whart. on Hom. secs. 170, 171. The first statute passed for this purpose was in Pennsylvania, in 1794. That statute, which is still in force in that state, provided as follows: "All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration of, or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder of the first degree, and all other kinds of murder shall be deemed murder of the second degree." The provision of the Connecticut statutes on this subject is the same: Gen. Stat. of Conn. (Rev.

of 1875), 498. So is that of the New Jersey statutes, except that "sodomy" is added to the enumerated felonies: Revision of New Jersey, 1709 to 1877, 240. So in Maryland, except that the enumerated felonies are as follows: "Arson, burning, or attempting to burn any barn, tobacco house, stable, warehouse, or other outhouse, not parcel of any dwelling-house, having therein any tobacco, hay, grain, horses, cattle, goods, wares, or merchandise, or in the perpetration of, or attempt to perpetrate any rape, sodomy, robbery, or burglary:" 1 Maryland Code, Public General Laws, 238. The Missouri statute is an exact transcript of that of Pennsylvania, with the addition of the words, "or other felony," after the word "burglary:" 1 Wagner's Statutes, 1870, 445. The Iowa statute, also, is like that of Pennsylvania, except that the word "mayhem" is inserted after "robbery:" Code of Iowa, 1873, secs. 3849, 3850. The Kansas statute is the same as that of Iowa, except that murder in the second degree is defined as homicide committed "purposely and maliciously, but without deliberation and premeditation:" Dasher's Comp. Laws of Kansas, 1879, 328. The New Hampshire statute is the same as that of Pennsylvania, except that the word "willful" is omitted, and the words "starving, torture," are inserted in lieu of "lying in wait:" General Statutes of New Hampshire, 1867, 528. The statute of Virginia on this subject, as well as that of West Virginia, is as follows: "Murder by poison, lying in wait, imprisonment, starving, or any willful, deliberate, and premeditated killing, or in the commission of, or attempt to commit arson, rape, robbery, or burglary, is murder of the first degree. All other murder is murder of the second degree:" Matthew's Virginia Crim. Laws, 154; 1 Kelly's Rev. Stat. of West Virginia, 1878, 386.

In Arizona, Idaho, Montana, and Nevada, the offenses of murder in the first and second degrees are defined in the same way as in Pennsylvania, except that the word "torture" is added after "lying in wait:" Comp. Laws of Arizona (1877) 72, sec. 257; Rev. Laws of Idaho (1874-1875); Codified Laws of Montana (1871-1872) 273; 1 Comp. Laws of Nevada (1873), sec. 2323.

The California statute is the same, with the further addition of "mayhem" to the enumerated felonies: Penal Code of California, sec. 189; 2 Hittell's Codes and Statutes, sec. 13,189. The statutes of Arkansas, Tennessee, and Vermont are the same as that of Pennsylvania, with the addition of the word "malicious" after "deliberate," and with the further addition of "larceny" to the enumerated felonies: Ark. Dig. (1874), sec. 1253; Gen. Stat. of Vermont (App.) 1033; 3 Thompson & Steger's Statutes of Tennessee, secs. 4598, 4599.

The provision of the Alabama code is as follows: "Every homicide perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing, or committed in the perpetration of, or the attempt to perpetrate, any arson, rape, robbery, or burglary; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed; or perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved mind regardless of human life, although without any preconceived purpose to deprive any particular person of life, is murder in the first degree; and every other homicide committed under such circumstances as would have constituted murder at common law, is murder in the second degree:" Rev. Code of Alabama (1867), sec. 3653. The definition given in the Utah statutes is the same as that of the Alabama code: Comp. Laws of Utah (1876), 585, sec. 1919.

The Indiana statutes provide that "if any person of sound mind shall

purposely and with premeditated malice, or in the perpetration or attempt to perpetrate any rape, arson, robbery, or burglary, or by administering poison, or causing the same to be done, kill any human being, such person shall be deemed guilty of murder in the first degree." "If any person shall purposely and maliciously, but without premeditation, kill any human being, every such person shall be deemed guilty of murder in the second degree." 2 Davis' Stat. of Indiana (Rev. of 1876), 423, *et seq.*

The provision of the Texas statutes on this subject is as follows: "All murder committed by poison, starving, torture, or with express malice, or committed in the perpetration, or in the attempt at the perpetration, of arson, rape, robbery, or burglary, is murder in the first degree; and all murder not of the first degree is murder of the second degree." Pasch. Dig., art. 2267; *Ake v. State*, 30 Tex. 466. The statute formerly contained the words "or other premeditated and deliberate killing," in lieu of the words "or with express malice." *Atkinson v. State*, 20 Tex. 522.

In Delaware it is provided that "every person who shall commit the crime of murder, with express malice aforethought, or in perpetrating, or attempting to perpetrate, any crime punishable with death, shall be deemed guilty of murder in the first degree;" and that all other murder is of the second degree, except a homicide committed by placing an obstruction on a railroad track, which is murder of the first degree: Laws of Delaware (Rev. Code of 1852, as amended in 1874), 764, 765, 775, 776. The statutes of Maine provide that "when murder is committed with express malice aforethought, or in perpetrating, or attempting to perpetrate, a crime punishable by death, imprisonment for life, or for an unlimited term of years, it shall be deemed murder of the first degree." All other murder is of the second degree: Rev. Stat. of Maine (1871), 825. The statutory definition of murder in the first degree in Massachusetts is as follows: "Murder committed with deliberately premeditated malice aforethought, or in the commission of or attempt to commit any crime punishable with death or imprisonment for life; or committed with extreme atrocity or cruelty, is murder in the first degree." All other murder is of the second degree: Gen. Stat. of Massachusetts (1860), 791.

The statute of New York, enacted in 1873, provides that a killing without authority of law, "unless it be manslaughter, or excusable, justifiable homicide, as hereinafter provided, shall be murder in the first degree in the following cases: 1. When perpetrated from a deliberate and premeditated design to effect the death of the person killed or of any human being; 2. When perpetrated by an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual; 3. When perpetrated without any design to effect death, by a person engaged in the commission of any felony. Such killing, unless it be murder in the first degree, or manslaughter, or excusable or justifiable homicide, as hereinafter provided, shall be murder in the second degree, when perpetrated intentionally, but without deliberation and premeditation." 1 Fay's Dig. of Laws of New York, 256.

The following are the provisions of the Oregon code with reference to this subject: "If any person shall, purposely, and of deliberate and premeditated malice, or in the commission or attempt to commit any rape, arson, robbery, or burglary, kill another, such person shall be deemed guilty of murder in the first degree." "If any person shall purposely and maliciously, but without deliberation and premeditation, or in the commission, or attempt to commit any felony other than rape, arson, robbery, or burglary, kill another,

such person shall be deemed guilty of murder in the second degree." Killing by an "act imminently dangerous to others and evincing a depraved mind, regardless of human life, although without any design to effect the death of any particular individual," is also murder in the second degree: Gen. Laws of Oregon, comp. of 1872, 406, secs. 506, 507, 508, 509. It is further provided in sec. 519, that "there shall be some other evidence of malice than the mere proof of the killing to constitute murder in the first degree; unless the killing was effected in the commission or attempt to commit a felony; and deliberation and premeditation, when necessary to constitute murder in the first degree, shall be evidenced by poisoning, lying in wait, or some other proof that the design was formed and matured in cool blood, and not hastily upon the occasion."

The definition of murder in the first degree, given in the Pennsylvania statute, is adopted in Wyoming, except that homicides committed in the perpetration of the enumerated felonies are not included, but are defined as murder in the second degree. Murder in the second degree is where one kills another "purposely and maliciously, but without deliberation and premeditation:" Comp. Laws of Wyoming (1876), 250, secs. 15, 16, 17. The statutes of Nebraska define murder in the first degree as follows: "If any person shall purposely and of deliberate and premeditated malice, or in the perpetration or attempt to perpetrate any rape, arson, robbery, or burglary, or by administering poison, or causing the same to be done, kill another; or if any person, by willful and corrupt perjury, or by subornation of the same, shall purposely procure the conviction and execution of any innocent person; every person so offending shall be guilty of murder in the first degree." Murder in the second degree is defined as in Wyoming: Gen. Stat. of Nebraska (1873) 720, secs. 3, 4.

In Wisconsin, Minnesota and Florida, murder is divided into three degrees: The first includes murder "perpetrated from a premeditated design to effect the death of the person killed, or of any human being." Murder of the second degree is that "perpetrated by any act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual." Murder of the third degree is that "perpetrated without any design to effect death by a person engaged in the commission of any felony:" 2 Taylor's Stat. of Wisconsin, 1826; 2 Bissell's Statutes at Large of Minnesota (1873) 985; Bush's Dig. Laws of Florida, 212. It seems that in the following states and territories there is no division of murder into degrees: Dakota, Rev. Codes (1877) 764, 765; Colorado, Laws of 1861-2, 292; Georgia, Code of 1873, 785. Illinois, Rev. Stat. (Cothran's Annot. ed. 1880) 473, 474; Kentucky, Gen. Stat. (1873) 322; Louisiana, Voorhies' Rev. Stat. (1876) 215; Mississippi, Rev. Code (1871) 577; North Carolina, Battle's Revisal, 294; Rhode Island, Gen. Stat. (1872) 539; South Carolina, Rev. Stat. (1873) 709. In several of these states, however, as in Illinois, Georgia and Kentucky, the object had in view in separating the offense into degrees is attained indirectly by giving the jury in a case of murder power to assess the penalty at death or imprisonment, in their discretion. In Rhode Island all murder is punished by imprisonment for life, except when committed by one already under sentence of imprisonment for murder, when the penalty is death: Gen. Stat. of 1872, 539.

CONSTITUENTS OF MURDER OF THE FIRST DEGREE.—It is clear, from an examination of the statutes above referred to, that in whatever form of words they undertake to define murder in the first degree, they all agree in assign-

ing to it certain distinctive characteristics. Leaving out of consideration homicides perpetrated by the specific means, or in the commission or attempt at commission of the felonies mentioned in the several statutes, it is necessary to constitute murder in the first degree that the killing should be willful, deliberate and premeditated: Whart. on Hom., sec. 176. There must be an intent to kill, and that intent must have been formed deliberately by previous thought.

INTENT TO TAKE LIFE.—First of all the killing must be willful, that is, "specifically willed:" Whart. on Hom., sec. 178. There must be a specific intention to take life: *Commonwealth v. Green*, 1 Ash. 289; *Pennsylvania v. Lewis*, Addison, 279; *Keenan v. Commonwealth*, 44 Pa. St. 55; *Donnelly v. State*, 2 Dutch. (N. J.) 465, 602; *Bivens v. State*, 11 Ark. 455; *People v. Bealoba*, 17 Cal. 389; *State v. Johnson*, 40 Conn. 136; *Fields v. State*, 52 Ala. 348. Speaking of the characteristic ingredients of murder in the first degree, Brickell, C. J., in the case last cited, says: "The first is a specific intention to take life, whether it be the life of the person slain, or of some other human being." The intent to kill is the essence of the crime: *Commonwealth v. Dougherty*, 1 P. A. Browne (App.) 18. On the other hand it was held in *State v. Nueslein*, 25 Mo. 111, that a specific intention to take life was unnecessary if the fatal stroke was given willfully and maliciously with the intent to inflict great bodily harm.

DELIBERATION AND PREMEDITATION.—An intent to kill is not alone sufficient to constitute an unlawful homicide murder in the first degree. There must also be deliberation and premeditation: *People v. Sanchez*, 24 Cal. 17; *People v. Foren*, 25 Id. 361; *People v. Nichol*, 34 Id. 211; *People v. Long*, 39 Id. 694; *Lewis v. State*, 3 Head. 127, 147; *Swan v. State*, 4 Humph. 139; *Milton v. State*, 6 Neb. 136; *State v. Brown*, 12 Minn. 538; *State v. Foster*, 61 Mo. 549; *State v. Mitchell*, 64 Id. 191. A malicious and intentional killing is not necessarily murder in the first degree: *Palmore v. State*, 29 Ark. 248; *State v. Foster*, 61 Mo. 549. An intent to take life may exist also in murder in the second degree. In *People v. Long*, 39 Cal. 694, the court below instructed the jury that the characteristic which distinguished murder in the first degree from murder in the second degree was the intent to take life, but the supreme court held the instruction erroneous. The words willful, deliberate, and premeditated, clearly mean more than intentional.

Where the statute defines murder in the second degree as a killing "purposely and maliciously," but without "deliberation and premeditation," it is still more clearly apparent that the true distinction between the two degrees is not solely the presence or absence of an intent to take life, but the existence or non-existence of deliberation and premeditation in conjunction with such intention. Under the New York statute of 1873, quoted above, Davis, J., in *People v. Walworth*, 8 Alb. L. J. 19, thus charged the jury on this point: "It might have been open to hold that an intentional murder, with actual malice, was justly within these words (deliberate and premeditated design to effect death), if there were not some other expression in the statute which would preclude a court from adopting that view of the effect of the law. And in creating the second degree, the legislature have, therefore, said 'such killing, unless it be murder in the first degree, or manslaughter, or excusable or justifiable homicide, as hereafter provided, shall be murder in the second degree when perpetrated intentionally, but without deliberation and premeditation.' The effect of this provision, in my judgment, is that it becomes the duty of the court to instruct you that the deliberation and premeditation required to constitute murder in the first degree is something quite

different from the actual presence of the intention formed at the instant of the striking of the blow, or the firing of the shot. It is essential that it should appear, in a case where the offense charged is murder in the first degree, under this statute, that there was some actual premeditation and premeditation in and upon the mind of the accused, in respect to the subject-matter of the offense, before the actual occurrence of the act which is alleged to be the crime."

So in *People v. Batting*, 49 How. Pr. 392, it was held, under the same statute, that the distinction between murder of the first degree and murder of the second degree is that in the former the intent to take life is deliberate, while in the latter there is a simple intent without deliberation and coolness.

Under a similar definition of murder in the second degree in the Indiana statutes, it was held, in *Fahnestock v. State*, 23 Ind. 231, in still more emphatic terms, that there must be something more than an intentional killing to constitute murder in the first degree. Elliott, J., delivering the opinion of the court, said: "Our statute, in defining murder in the second degree, uses the words 'purposely and maliciously.' Purposely here means intentionally and designedly; and, therefore, to make the act murder in the second degree, the intention or design, the purpose to perpetrate it, must be formed before the act is committed.

"But to render the act murder in the first degree, something more than the purpose or intention to commit it is requisite; the purpose must be premeditated. Webster defines 'premeditate' thus: '1. To think, consider, or revolve in the mind beforehand; to deliberate, to have formed in the mind by previous thought or meditation; 2. Previously contrived, designed, or intended; deliberate, as premeditated murder.' The principle involved, by which murder in the first degree is distinguished from murder in the second degree is this: In the former, premeditated malice requires that there should be time and opportunity for deliberate thought; and that after the mind conceives the thought of taking the life, the conception is meditated upon and a deliberate determination formed to do the act; that being done, then, no difference how soon afterward the fatal resolve is carried into execution, it is murder in the first degree.

"While, in murder in the second degree, the purpose or intention to kill is followed immediately by the act, it is not premeditated; the time and circumstances are not such as to allow of deliberate thought; yet to make it murder, even in the second degree, there must be a formed design and purpose to kill."

The fixed resolve to kill, which belongs to murder in the first degree, is something different "from that minor quality of intention which lacks the marked and distinguishing characteristic of deliberation or cold premeditation." Curry, J., in *People v. Foren*, 25 Cal. 361. A premeditated design to kill involves a degree of deliberation and forethought which does not exist necessarily in an "intention" to kill: *State v. Brown*, 12 Minn. 538.

Nevertheless, the specific intent to take life is held by high authority to be the true criterion of murder in the first degree. Lowrie, C. J., delivering the opinion of the court, in *Keenan v. Commonwealth*, 44 Pa. St. 55, says: "A careful study of our jurisprudence on this subject clearly reveals the fact that such terms as a deliberate purpose, or a deliberate and premeditated attempt to kill, or a specific intent to take life, are sometimes substituted for the words of the statute; yet our reported jurisprudence is very uniform in holding that the true criterion of the first degree is the intent to take life.

The deliberation and premeditation required by the statute are not upon the intent, but upon the killing. It is deliberation and premeditation enough to form the intent to kill, and not upon the intent after it has been formed. An intent distinctly formed, even 'for a moment' before it is carried into act, is enough.

"What the definition requires, therefore, is a distinctly formed intent to kill, not in self-defense and without adequate provocation. It requires the malice prepense or aforethought of the common law definition of murder to be, not a general malice, but a special malice that aims at the life of a person. This distinctly formed intent to take life is easily distinguished in the general from the instinctive and spontaneous reaction of mind and body against insult and injury, which is often the result of no distinctly formed intention; and also from those cases of previous and deliberate intention to kill, which may override even what, without it, would be adequate provocation given at the time of the killing.

"Keeping this common understanding of the definition in mind we shall also get clear of the influence of the cases in other states; where the terms deliberate and premeditated are applied to the malice or intent, and not to the act, and thus seem to require a purpose brooded over, formed, and matured before the occasion at which it is carried into act. Under such a definition of the intention, all our jurisprudence by which malice and intent are implied from the character of the act, and from the deadly nature of the weapon used, would be set aside; for we could not from these imply such a previous and deliberate, but only a distinctly formed intent, and this involves deliberation and premeditation, though they may be very brief. We should, therefore, blot out all our law relative to implied intent or malice, and require it to be always proved as express. And this would be a most disastrous result; for the most deliberate murderers are usually those who know how to conceal their intent until the occasion arises for the execution of it." To the same effect is the opinion of Johnson, J., in *People v. Clark*, 7 N. Y. 393.

No doubt the intent to take life is the distinctively vicious element in this offense, but in order that it may be so it must be the result of deliberation and premeditation, thus showing that it is not a sudden impulse, but the steadfast resolve and deep-rooted purpose of a malignant heart. The deliberation and premeditation simply relate to the state of mind of the party when the purpose is formed. Says Roberts, J., in *Atkinson v. State*, 20 Tex. 522: "The ordinary meaning of the word 'premeditated' is 'previously considered or meditated,' and of 'deliberate' is 'not sudden or rash,' 'carefully considering the probable consequences of a step.' These words, although prefixed to the act of 'killing,' necessarily refer to the state of mind of the slayer, at the time of the 'killing,' and taken together in their full force, imply that the killing is designed before the act, and that such design is not the sudden, rash conception of an enraged mind, but that the mind is sufficiently cool and self-possessed to consider of and contemplate the nature of the act then about to be done. It would matter not whether the malice was express or implied, that is shown by antecedent circumstances, or evidenced by the manner or enormity of the act itself, if the jury should believe such a state of mind to exist at the time of the killing, it would be murder in the first degree. When the jury are satisfied that such is fully and clearly the state of the mind, fully formed, and settled upon before, and continuing with fixed purpose at the time of the killing, the length of time, during which such state of mind has existed, is not material, provocation is immaterial, and con-

joined anger and passion are immaterial; it is murder in the first degree. If, however, on the other hand, the jury should believe this not to be the state of mind of the slayer at the time of the killing; but that in and from a transport of passion (*furor brevis*) the intention to kill was formed and executed, although the provocation, producing such state of mind, was not sufficient, in law, to extenuate the killing to manslaughter, it would be only murder in the second degree."

To say that a murder was of the first degree, simply because it was intended at the moment, would be to construe the words, "deliberate and premeditated" out of the statute. "It is a perversion of terms," say the court, in *Nye v. People*, 35 Mich. 16, "to apply the term deliberate to any act which is done on a sudden impulse." All the elements contained in the statutory definition of murder in the first degree must concur to constitute the offense. "Proof must be adduced to satisfy the mind that the death of the party slain was the ultimate result which the concurring will, deliberation and premeditation of the party accused sought:" *Commonwealth v. Jones*, 1 Leigh, 610; *per Daniel, J.*: An intent to kill may exist in other degrees of unjustifiable homicide, but in no other degree is that intent formed into a fixed purpose by deliberation and premeditation. This implies something more than the "malice aforethought" of the common law, for that was not necessarily a "deliberate and calculating malice:" *Nye v. People*, 35 Mich. 16, nor did it necessarily import a "preconceived intent to take life" since the object might be to do some other felony: *State v. Millain*, 3 Nev. 409.

THE STATE OF MIND OF THE ACCUSED, at the time of forming the purpose to kill, is the important point in determining whether the homicide is murder in the first degree or not; and, as already remarked, it is to this that the terms "deliberation" and "premeditation," used in the statute, refer. There must be a deliberate and premeditating mind. In Texas, where murder in the first degree is defined as murder perpetrated "with express malice," it is held, adopting the language of Blackstone, 4 Bl. Com. 199, that to constitute this offense, there must be "a sedate, deliberate mind and formed design" to kill: *McCoy v. State*, 25 Tex. 33; *Ake v. State*, 30 Id. 466; *Farrer v. State*, 42 Id. 265; *Duebbe v. State*, 1 Tex. App. 159; *Primus v. State*, 2 Id. 369. In *Ake v. State*, 30 Tex. 466, a "sedate mind" is said to be "an unruffled mind, undisturbed by passion, that is, at repose, tranquil, and serene." This, however, gives the term "sedate" too strict a meaning. A better explanation of what it imports, when used with reference to this subject, is contained in the learned opinion of Moore, J., speaking for the court in *Farrer v. State*, 42 Tex. 271. He says: "The design must originate in, or result from, a sedate, deliberate mind. These words, indicating the state of mind when the design is formed, are not, however, to be understood in an absolute and unconditional sense; for it would be almost impossible that any one, not altogether devoid of human sensibilities, and reduced to the level of the brute, could deliberately design to take the life of a fellow-being with an absolutely calm and unruffled mind, without any character of mental excitement whatever. Still, they certainly import that the mind is sufficiently composed, calm, and undisturbed to admit of reflection and consideration on the design; that it is in a condition to comprehend and understand the nature and character of the act designed, and its probable consequences and results. The act must not result from a mere sudden, rash, and immediate design, springing from an inconsiderate impulse, passion, or excitement, however unjustifiable and unwarranted it may be; for in such case the sedate, deliberate mind is wanting, and without it there can be no express malice."

This construction of the terms "sedate, deliberate mind," is adopted by the court in *Duebbe v. State*, 1 Tex. App. 159; and in *Primus v. State*, 2 Id. 369. In the latter case, however, it was held, that if there was this state of mind on the part of the accused, the offense would be murder in the first degree, even though there was no actual design to take the life of the deceased, provided there was a purpose to do him serious bodily harm, which might probably result in his death, and did so result. Certainly the language used by Mr. Justice Moore describes very aptly the state of mind which ought to exist in order to constitute either a killing with "express malice," or a "willful, deliberate, and premeditated killing."

It necessarily results from this that it is competent for one accused of murder in the first degree to give evidence of facts tending to show that his state of mind was such as to be unfavorable to deliberation, as by proving that he was intoxicated: *Swan v. State*, 4 Humph. 136; *Pirtle v. State*, 9 Id. 663; *Haile v. State*, 11 Id. 154; *State v. Johnson*, 40 Conn. 136; *Boswell v. Commonwealth*, 20 Grat. 860. This is not making drunkenness an excuse or extenuation of crime; it is merely permitting the accused to show inferentially that he did not possess that condition of mind which is necessary to the commission of the crime. It is further to be observed, that where the design to kill was formed deliberately and with premeditation, the fact that the accused afterwards became intoxicated, and was so at the time of the killing, can not affect the degree of the homicide. Nor, if the design was so formed, is it material that the accused was in a passion at the time of the killing: *State v. Garrard*, 5 Or. 216.

It has been sometimes argued, as it was in the principal case, that where the statute specifies certain kinds of homicide as constituting murder in the first degree, as where it is perpetrated by poison, lying in wait, etc., and then adds, "or any other willful, deliberate, and premeditated killing," it imports that the enumerated instances furnish the standard of deliberation and premeditation, and that no murder is of the first degree unless it is perpetrated with similar forethought, calculation, and preparation. The fallacy of this position is very clearly exposed in the principal case, as well as in *Burgess v. Commonwealth*, 2 Va. 483; and in *Commonwealth v. Jones*, 1 Leigh, 610. In the latter case, Daniel, J., delivering the opinion of the court, refers with approval to the doctrine laid down in *Whiteford v. Commonwealth*, and proves by irrefragable argument, the true construction of the statute to be that where murder is committed in any of the ways there specified, no other evidence of willfulness, deliberation, and premeditation shall be required to make it murder in the first degree, but that the enumerated instances do not furnish, and were not intended to furnish, the standard by which to determine whether any other killing is murder in the first degree. Indeed, it is clear, without argument, that the words "other willful, deliberate, and premeditated killing," include all homicides which contain those ingredients in any degree whatever. There may be more deliberation and premeditation upon the killing in one case than in another, but if there is any at all it is murder in the first degree.

NO PARTICULAR TIME NECESSARY.—It follows, from what has just been said, that if a killing is willful, deliberate, and premeditated, it does not matter how short the time is before the homicidal purpose is carried into execution. The question is not how long did the prisoner deliberate before giving the fatal stroke, but did he deliberate at all? *State v. Ah Mook*, 12 Nev. 369. So swift are the operations of the mind, and so quickly may the deed follow the thought, that the deliberation and premeditation, the de-

cision and the act, may all occur in a very brief space of time. "There need be no appreciable space of time between the intention to kill and the act of killing. They may be as instantaneous as successive thoughts of the mind." *People v. Sanchez*, 24 Cal. 17; *People v. Cotta*, 49 Id. 166. There must be deliberation and premeditation, and a formed design to kill, but if they exist, it matters not how short the time before the killing, it is murder in the first degree. "Mature reflection and deliberation upon the act of killing" are not necessary: *McAdams v. State*, 25 Ark. 405, citing and approving the principal case. "A purpose to kill may be conceived and deliberately executed, although but a very brief time elapse between the conception and the execution of the purpose. Deliberation does not mean brooded over, considered, reflected upon for a week, a day, or an hour, but it means an intent to kill, executed by the party, not under the influence of a violent passion, suddenly aroused, amounting to a temporary dethronement of reason, but in the furtherance of a formed design, to gratify a feeling of revenge, or to accomplish some other unlawful purpose." Henry, J., in *State v. Wieners*, 66 Mo. 13, 6 Cent. L. J., 70. Says Scott, J., delivering the opinion of the court in *Bivens v. State*, 11 Ark. (6 Eng.) 455: "Premeditation has no definite legal limits, and therefore if the design to kill was but the conception of a moment, but was the result of deliberation and premeditation, reason being upon its throne, that is altogether sufficient; and it is only necessary that the premeditated intention to kill should have actually existed as a cause determinately fixed on before the act of killing was done, and was not brought about by provocation received at the time of the act or so recently before as not to afford time for reflection."

It is the uniform language of the cases that deliberation and premeditation for a moment, as well as for a week or a year, will render an intentional killing murder in the first degree: *McKenzie v. State*, 26 Ark. 334; *Miller v. State*, 54 Ala. 153; *People v. Nichol*, 34 Cal. 211; *People v. Williams*, 43 Id. 344; *State v. Dunn*, 18 Mo. 419; *State v. Jennings*, Id. 435; *State v. Shoults*, 25 Id. 128; *State v. Starr*, 38 Id. 270; *State v. Holme*, 54 Id. 153; *State v. Lane*, 64 Id. 319; *State v. Millain*, 3 Nev. 410; *Donnelly v. State*, 26 N. J. L. (2 Dutch.) 463; *Shoemaker v. State*, 12 Ohio, 43; *State v. Garrard*, 5 Or. 216; *Commonwealth v. Daley*, 4 Penn. L. J. 156; *Commonwealth v. Drum*, 58 Pa. St. 16; *Anthony v. State*, Meigs, 265; *State v. Dale*, 10 Yerg. 551; *Lewis v. State*, 3 Head, 127, 147; *Jordan v. State*, 10 Tex. 492; *Duebbe v. State*, 1 Tex. App. 159; *Halbert v. State*, 3 Id. 656; *Bennett v. Commonwealth*, 8 Leigh, 745; *State v. Anderson*, 5 Am. Dec. 648. In *State v. Dale*, 10 Yerg. 551, the pretended provocation and the killing all occurred within from five to twenty minutes, and it was held that there was sufficient evidence of deliberation and premeditation. In *Bennett v. Commonwealth*, 8 Leigh, 745, a half an hour only intervened between the provocation and the killing, and it was held sufficient. In *McAdams v. State*, 25 Ark. 405; and *McKenzie v. State*, 26 Id. 334, only a brief space of time elapsed between the quarrel and the killing, and it was held enough. There must, however, be sufficient time for deliberation and premeditation, short though it be, to satisfy the jury that the intention to kill was fully and consciously formed in the mind, and was not the offspring of rashness and impetuous temper: *Commonwealth v. Drum*, 58 Pa. St. 16. If there was provocation, there must be sufficient time to cool before the blow is struck. But the law does not and can not measure this time. Each case must go upon its own circumstances. The time within which an ordinary man would cool under similar

circumstances, may be said to be reasonable: *Commonwealth v. Green*, 1 Ash. 289; *Kilpatrick v. Commonwealth*, 31 Pa. St. 198.

DELIBERATION AND PREMEDITATION NOT PRESUMED.—It is well settled that where an unlawful killing is proved, without more, the presumption is that it is murder in the second degree; for malice will be presumed from such killing. But in order to make the killing murder in the first degree, deliberation and premeditation must be proved; they will not be inferred from the killing: *People v. Potter*, 5 Mich. 1; *State v. Mitchell*, 64 Mo. 191; *State v. Lane*, Id. 319; *State v. Testerman*, 68 Id. 408; *Schlenker v. State*, 2 N. W. Rep. 710; S. C., 9 Neb. 300; *State v. Millain*, 3 Nev. 410; *State v. Turner*, Wright (Ohio) 20; *O'Mara v. Commonwealth*, 75 Pa. St. 424; *Ake v. State*, 30 Tex. 466; *Hamby v. State*, 36 Id. 523; *Caldwell v. State*, 41 Tex. 86; *Murray v. State*, 1 Tex. App. 417; *Hill v. Commonwealth*, 2 Grat. 594. In *Ake v. State*, 30 Tex. 466, it appeared that the deceased came to where the prisoners were skinning a beef; that a fight ensued; that the bodies of the deceased were afterwards found fearfully mangled, showing that they had been chopped to death with axes, and bloody axes were found in the possession of some of the defendants, but it did not appear who began the affray, or what were the circumstances, or which of the prisoners used the axes, and it was held that the killing could not be presumed to be more than murder in the second degree. In *Hamby v. State*, 36 Tex. 523, the evidence showed that the prisoner and the deceased had been drinking together during the day, but no quarrel was proved. They finally separated, and the defendant was seen riding the deceased's horse. The deceased afterwards came in search of the defendant, saying he wanted to get his horse back. Not long after the defendant was seen riding rapidly, the deceased in pursuit, and hallooing to him. No more was known as to what occurred between them, but shortly afterwards the body of the deceased was found shot in the back, head, and side, and with his throat cut, lying near where he had been pursuing the defendant, and it was held that the circumstances did not warrant a conviction of murder in the first degree. It certainly would seem that in both these cases there was some evidence of deliberate killing, in the fact that the bodies were found with so many wounds upon them, and of such a fearful character.

EVIDENCES OF DELIBERATION AND PREMEDITATION.—Although deliberation and premeditation can not be presumed from the mere fact of an unlawful killing, they may undoubtedly be inferred from the circumstances of the homicide. Indeed, in most cases there is no other evidence of their existence. A deliberate murderer does not ordinarily declare his purpose beforehand. That circumstantial evidence is competent in such cases follows, therefore, from necessity: *Bivens v. State*, 11 Ark. (6 Eng.) 455; *Fields v. State*, 52 Ala. 348; *McCoy v. State*, 25 Tex. 33; *Wilson v. State*, 43 Id. 472; *Singleton v. State*, 1 Tex. App. 501; *Howell v. Commonwealth*, 26 Grat. 995. The circumstances from which deliberation and premeditation may be inferred in such cases are exceedingly various. They may consist of threats, preparation of weapons, search for the victim, absence of provocation, dangerous nature of the instrument used, manner of using it, etc.: *Respublica v. Bob*, 4 Dall. 145; *Commonwealth v. Williams*, 2 Ash. 69; *Commonwealth v. Murray*, Id. 41; *Commonwealth v. Green*, 1 Id. 289; *Clark v. State*, 8 Humph. 671; *Swan v. State*, 4 Id. 139; *Burgess v. Commonwealth*, 2 Verg. Cas. 483; *Bennett v. Commonwealth*, 8 Leigh. 745; *Commonwealth v. Jones*, 1 Id. 612; *Hill v. Commonwealth*, 2 Grat. 594.

Where after an affray the parties separated, and some little time had intervened during which the prisoner had made several threats, and at last seeing the deceased pass the door jumped up, seized a musket, and shot him dead, and subsequently expressed gratification at what he had done, the evidence of deliberation and premeditation was held sufficient: *Commonwealth v. Green*, 1 Ash. 289. So where there was no provocation, or only slight provocation, and the prisoner, after using opprobrious language to the deceased, suddenly rose and shot him, having previously made threats against his life: *McKenzie v. State*, 26 Ark. 334. So where the prisoner evidently provoked an affray for the purpose of using a deadly weapon: *Clark v. State*, 8 Humph. 671; *Stewart v. State*, 1 Ohio St. 66; *State v. Wieners*, 66 Mo. 13. In *McAdams v. State*, 25 Ark. 405, it appeared that there had been no previous trouble between the parties. The prisoner being at the house of the deceased, the latter came out with his gun, saying that he was going out to hunt squirrels. Having set the gun down the prisoner took it up and pointed at the sister of the deceased, when the deceased told him not to do so, as the gun was loaded. He then turned, and pointed the gun at the deceased, saying, "I will shoot you," when the sister of the deceased requested him to desist. The prisoner then put the gun on his shoulder and began to walk away, the deceased following and holding out his hand for the gun. Having gone a few steps, the prisoner suddenly wheeled about, saying, "I will shoot you," leveled the gun, and fired. It was held that the proof of deliberation and premeditation was ample. So where the parties had in the course of a quarrel several times drawn weapons on each other, but finally separated, and as the prisoner was walking away the deceased called after him, charging him with cowardice, when the prisoner turned and asked him if he meant it, and on his replying that he did, immediately shot him: *Atkinson v. State*, 20 Tex. 522. So where the prisoner, without provocation, assaulted a police officer who was trying to arrest another, knocked him down with a heavy cart-rung, and returned and struck him again as he lay upon the ground: *People v. Clark*, 7 N. Y. 393. So where the deceased having called at the prisoner's house and asked to stay all night, after some words the prisoner told him he would kill him if he did not go away, and the deceased having renewed his application a few minutes afterwards, the prisoner fired the fatal shot: *Dale v. State*, 10 Yerg. 549. In *McCue v. Commonwealth*, 78 Pa. St. 185, there appeared to have been no quarrel previous to the killing. The prisoner and the deceased occupied the same house. On the day of the homicide, a visitor being present, the prisoner drew a pistol and laid it on the window-sill. The visitor asked him if he carried a pistol, when he replied that he did; that it stood him in hand to, and that he would probably use it before the witness thought. The deceased, who was lying on the bed, rose and said: "You are always talking of putting a bullet into somebody. If you think you can put one into me, come out and try it." He then threw off his coat and ran out of the room. The prisoner seized his pistol, ran out after him, and when he got within four feet of him, fired the shot which killed the deceased; and this was held a deliberate and premeditated killing.

In *Green v. Commonwealth*, 83 Pa. St. 75, the parties had long been at feud, and the prisoner had made threats against the deceased. On the day of the homicide, they had been quarreling at the house of the deceased, but finally separated, the prisoner going towards his home with his gun on his shoulder. The deceased picked up the poker, ran out after him, and called to him that

if he would come back, he should never get away alive. The prisoner turned, with an oath, saying, "I have been waiting for that," advanced towards him and fired, and afterwards beat him over the head with the gun; and the killing was adjudged murder in the first degree. Where the killing is done upon a sudden difficulty, it may be attended with such circumstances of enormity, malignity, and cruelty, as to furnish evidence of premeditation and deliberation: *Duebbe v. State*, 1 Tex. App. 159. So where the prisoners, after making frequent threats, took the deceased and whipped him to death: *State v. Jennings*, 18 Mo. 435.

KILLING ONE PERSON WHILE ATTEMPTING TO KILL ANOTHER.—There is some conflict in the decisions as to whether or not a killing can be said to be willful, deliberate, and premeditated, where the deceased was the unintended victim of a deliberate attempt to kill another person; as where a husband, in trying to kill his wife, kills the infant in her arms: *Commonwealth v. Dougherty*, 1 P. A. Browne (App.) 21. The better doctrine is that this is murder in the first degree: *Id.*; *State v. Raymond*, 11 Nev. 98; *Warren v. State*, 4 Cold. 130. On the other hand, it is held in a very able opinion by McKinney, J., in *Bratton v. State*, 10 Humph. 103, that this is only murder in the second degree, because there is no premeditated design to kill the person actually slain. To the same effect are *McCoy v. State*, 25 Tex. 33; *Taylor v. State*, 3 Tex. App. 387; *Halbert v. State*, *Id.* 656. In many of the states, as will be seen by the foregoing *resumé* of the statutes on this subject, this class of cases is expressly provided for.

HOMICIDE BY SPECIFIED MEANS OR IN COMMITTING FELONY.—The weight of authority is in favor of the position laid down in the principal case that where a homicide, which would be murder at common law, is perpetrated by any of the means mentioned in the statute, or in the commission of any of the enumerated felonies, it is murder in the first degree, without further evidence of willfulness, deliberation and premeditation: *Commonwealth v. Jones*, 1 Leigh. 610; *Souther v. Commonwealth*, 7 Grat. 673; *Howell v. Commonwealth*, 26 *Id.* 995; *Commonwealth v. Hanlon*, 3 Brewst. (Pa.) 461; *Riley v. State*, 9 Humph. 646; *People v. Bealoba*, 17 Cal. 389; *State v. Brown*, 7 Or. 186; *State v. Cooper*, 13 N. J. L., 1 Green, 361; *State v. Pike*, 49 N. H. 399; *Buel v. People*, 18 Hun. 487. Indeed this doctrine is no where controverted with respect to homicides committed while perpetrating the enumerated felonies; and in those cases it matters not that the killing was not designed. But where a homicide is committed by poison, or lying in wait, it is held in *Commonwealth v. Dougherty*, 1 P. A. Browne (App.) 18, that the intent to kill must still be proved, and that the means employed merely dispenses with any other evidence of deliberation. So in *Commonwealth v. Keeper of the Prison*, 2 Ash. 227, it is said that a specific intent to kill is in such cases necessary, and that, therefore, where poison administered to produce an abortion undesignedly kills the woman, it is not murder in the first degree. So in *Bechtelheimer v. State*, 54 Ind. 128, where a woman was killed by poison administered to excite sexual passion, for the purpose of having intercourse with her. So in *State v. Dowd*, 19 Conn. 368, it is said that murder by poison may, notwithstanding the statute, be murder in the second degree. The correct doctrine would seem to be that if the offense was murder at common law, and is perpetrated in one of the specified ways, it is murder in the first degree under the statute.

MURDER IN THE SECOND DEGREE.—In those states where all murder not of the first degree is declared to be of the second, the definition of the former

degree defines the latter. And, in general, it may be laid down that every killing done maliciously, but without deliberation or premeditation, and not by any of the specified methods or in the commission of the enumerated felonies, is murder of the second degree: *State v. Decklotts*, 19 Iowa, 447; *State v. Moore*, 25 Id. 128; *People v. Doyell*, 48 Cal. 85; *Caldwell v. State*, 41 Tex. 86.

For a further consideration of the different degrees of murder, the definitions of the words "deliberate," "premeditated," "willful," etc., and the duty of courts to instruct juries upon the true meaning of these words, see *State v. Sharp*, 10 C. L. J. 390; *State v. Curtis*, 10 C. L. J. 370, and the notes to both cases.



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5. **POSSESSION AND THE QUO ANIMO** of the possessor are the tests. *Id.*
6. **POSSESSOR'S BELIEF OF THE VALIDITY OF HIS TITLE**, from what circumstances inferred. *Id.*
7. **CLAIM UNDER A WRITTEN CONTRACT** to convey, which equity would specifically enforce against the vendor, is a sufficient claim under color of title to support an adverse possession within the statute of limitations. *Id.*
8. **THAT CLAIM OF TITLE WAS MADE UNDER A FOREIGN GOVERNMENT** can not be inferred by the court, so as to invalidate a title by adverse possession, unless specially found by the jury. *Id.*
9. **TITLE IN THE PEOPLE IS NOT BARRED** by adverse possession, short of forty years. *Id.*
10. **GRANTEE OF THE PEOPLE IS BARRED** by twenty years' adverse possession after his title accrued, though it commenced before. *Id.*
11. **POSSESSION WITHOUT CLAIM OF TITLE** never confers title. *Id.*

12. CLAIM OF TITLE, HOWEVER GROUNDLESS, makes a possession adverse, and such possession will ripen into title against the people or an individual. *Id.*
13. POSSESSION AND SUCH IMPROVEMENT AS IS CUSTOMARY with owners, without disavowal of title, payment of rent, or recognition of title in another, will raise a presumption of an entry and holding as absolute owner. *Id.*
14. TITLE PRESUMED LAWFUL, WHEN. — Where a party is in possession claiming title without showing what that title is, it will be presumed lawful. *Per* Colden, senator. *Id.*
15. POSSESSION NOT ADVERSE IN ITS COMMENCEMENT may become so by a subsequent claim of title amounting to actual ouster. *Per* Spencer, senator. *Id.*
16. DEED UNDER WHICH TITLE IS CLAIMED need not be produced. *Per* Viele, senator. *Id.*
17. DEFECTIVE DEED does not prevent possession thereunder from being adverse. *Per* Stebbins, senator. *Id.*
18. GRANT OF FOREIGN GOVERNMENT may be the foundation of an adverse possession. *Per* Viele, senator, denying *Jackson v. Waters*, 12 Johns. 368. *Id.*

AGENCY.

GENERAL AGENT OF CORPORATION HAS NO POWER TO CONVEY the real estate of the corporation; to effect such an object a specific authority is indispensable. *Stow v. Wye*, 99.

See EVIDENCE, 11, 24.

ALIMONY.

See MARRIAGE AND DIVORCE, 8.

ALTERATION OF INSTRUMENTS.

1. ALTERATION OF A LEASE FOR YEARS, even in an immaterial part, by one claiming a benefit under it, destroys his right of action on it. *Lewis v. Payn*, 427.
2. CANCELLATION OR LOSS OF A DEED does not divest title vested under it. *Id.*
3. WHEN AN ESTATE CAN NOT HAVE EXISTENCE BUT BY DEED, the fraudulent destruction of the deed, by the holder of the estate, destroys his remedy thereon as well as his estate. *Id.*
4. AN ESTATE WHICH MAY EXIST WITHOUT DEED is not destroyed by the fraudulent cancellation and destruction of the deed conveying it, by the holder thereof, but his right of action on covenants contained therein is gone. *Id.*
5. RENT CHARGE EXISTS ONLY BY DEED, and therefore, both deed and estate are destroyed by a fraudulent alteration of the deed. *Id.*
6. WHERE A LEASE IS EXECUTED IN DUPLICATE, each party receiving one, both are originals; the fraudulent alteration of one of them, by the party holding it, does not destroy his estate under it, if the other remains intact. *Id.*
7. ALTERATION IN A BOND BY THE OBLIGEE, in a point not material, avoids it. *Id.*

See EQUITY, 16.

AMENDMENTS.

1. **LOST PAPERS.**—ORAL PROOF MAY BE RECEIVED and recorded at a term subsequent to which a judgment was entered, showing the loss of process and the nature of the sheriff's return thereon, for the purpose of upholding a judgment. *Gentry v. Hulchcraft*, 172.
2. **EXHIBITS IN CHANCERY**, which are lost or mislaid after the decree, may be supplied at a subsequent term. *Id.*
3. **AMENDMENTS AFTER WRIT OF ERROR.**—If, during the pendency of a writ of error, proof is made by the defendant in error, to the court of original jurisdiction, of the existence and loss of the process and sheriff's return, the absence of which is the only error assigned in the appellate court, upon such proof being certified to the latter court, the judgment will be affirmed. *Id.*

See EXECUTIONS, 21.

APPLICATION OF PAYMENTS.

1. **APPLICATION OF PAYMENTS.**—A PERSON INDEBTED TO ANOTHER on different demands, upon making a payment may apply it to any demand he pleases; if he fails to do so, the creditor may appropriate the payment as he pleases. *Baker v. Stackpoole*, 508.
2. **WHERE THE PARTIES DO NOT APPROPRIATE A PAYMENT**, the law makes the appropriation, according to certain presumptions. *Id.*
3. **PAYMENT BY PARTNER, APPLICATION OF.**—A creditor, having a demand against a firm, and a later demand against one of the partners, upon receiving an unappropriated payment from such partner, may, it seems, apply it first to the partner's individual debt; but the residue, at least, must be appropriated upon the firm debt, and can not be retained and applied on future demands against such partner. *Id.*
4. **CREDITOR CAN NOT RETAIN PAYMENT** to apply on future demands, leaving a prior debt unpaid. *Id.*

ARBITRATION AND AWARD.

AFTER SUBMISSION OF ALL DEMANDS in controversy, between the parties to arbitrators, and a final award, one of the parties can not be relieved as to a claim which he forgot to lay before the arbitrators. *McJimsy v. Traverser*, 43.

ARREST.

SERVICE OF A WRIT OF CAPIAS AD RESPONDENDUM, by delivery of a copy thereof, is not an arrest within the meaning of the act exempting from arrest persons necessarily attending on courts. *Huntington v. Shultz*, 660.

ASSAULT AND BATTERY.

See DAMAGES, 2.

ASSIGNMENT.

See FRAUDULENT CONVEYANCES, 2, 3.

ATTACHMENT.

THE ANSWERS OF A GARNISHEE on a foreign attachment, given in reply to interrogatories by the plaintiff, may, on a *scire facias* against the garnishee, be contradicted by showing that he swore differently on another occasion. *Adlum v. Yard*, 609.

ATTORNEY AND CLIENT.

1. AN ATTORNEY AT LAW HAS NO AUTHORITY to enter a *retrazit*, that being a perpetual bar. *Lambert v. Sandford*, 149.
2. ATTORNEY IS NOT PRIVILEGED FROM DISCLOSING FACTS which he might have known without being an attorney in the cause. *Stoney v. McNeil*, 666.

BANKRUPTCY AND INSOLVENCY.

DISCHARGE CAN NOT BE CONTRADICTED in pleading, if the statute makes it conclusive as evidence. *Cunningham v. Bucklin*, 432.

BONA FIDE PURCHASERS.

1. BONA FIDE PURCHASER, PLEA OF, WHEN AVAILABLE.—To make the plea of a *bona fide* purchase, without notice, available, the want of notice must be denied positively, and the person pleading it must have completed his purchase by paying all the consideration, and receiving his conveyance; and if, before either of these events, he had received such information as would put a prudent man upon inquiry, his plea must fail. *Nantz v. McPherson*, 216.
2. CREDITOR WHO TAKES A MORTGAGE to secure an antecedent debt, without releasing a surety, is not a purchaser for value, without notice. *Donaldson v. Bank of Cape Fear*, 577.
3. BONA FIDE PURCHASER FROM FRAUDULENT GRANTEE.—Where a conveyance is fraudulent as to creditors of the grantor, but the grantee subsequently conveys to a *bona fide* purchaser for value, who has no notice of the fraud, the latter will be protected against the creditors of the prior fraudulent grantor. *Coleman v. Cocke*, 757.
4. SUCH PURCHASER'S FAILURE TO RECORD HIS CONVEYANCE does not impair his right, where his grantor's interest attached before the contesting creditor procured his judgment. *Id.*

See EXECUTIONS, 17.

BONDS.

1. BOND WITH PAYEE'S NAME IN BLANK, given with authority to fill up the blank, will entitle the payee to insert his name. *Boardman v. Gore*, 73.
2. SUCH AUTHORITY NEED NOT BE UNDER SEAL nor in writing; it may rest in parol. *Id.*
3. PERFORMANCE OF THE CONDITION OF A BOND becoming impossible by the act of God, or of the law, or of the obligee, is excused, and no action lies thereon; as where a recognizance is given for a sheriff's appearance on attachment, and he is sick at the day and afterwards dies. *People v. Manning*, 451.
4. SUCH RECOGNIZANCE DIFFERS FROM THAT OF SPECIAL BAIL in a civil suit in this respect. *Id.*
5. WHERE A BOND ASSIGNED IN BLANK is left by the assignee thereof, in the possession of a person to whom one of the obligors, not knowing that the person so holding it was not the real owner, paid a portion of the amount payable thereon, such payment will be deducted from the amount due on the bond; but an agreement by such holder, to release the obligor from all further liability on the bond, will not bind the assignee. *Stoney v. McNeil*, 666.

See ALTERATION OF INSTRUMENTS, 7; EQUITY, 1; PLEADING AND PRACTICE, 2, 4, 5; SURETYSHIP, 2, 3, 7.

BOOKS OF ACCOUNT.

See EVIDENCE, 22.

CONFESSIONS.

See CRIMINAL LAW, 6, 7, 8, 9, 10, 11.

CONFLICT OF LAWS.

- A WIFE MAY CLAIM ACQUESTS AND GAINS made in Louisiana, although she was married abroad and never came in it. *Cole's Widow v. His Executors*, 241.

See MARRIAGE AND DIVORCE, 11.

CONSIDERATION.

1. A SUFFICIENT CONSIDERATION is essential to the validity of a contract in writing under the statute of frauds. *Brown v. Adams*, 36.
 2. MERE WRITTEN CONTRACT IS OF NO HIGHER DIGNITY than one by parol, and a consideration therefor must be proved. *Cook v. Bradley*, 79.
 3. MORAL OBLIGATION IS NOT SUFFICIENT to support a contract, except in cases where a good or valuable consideration has once existed. *Id.*
 4. A SON IS UNDER NO LEGAL OBLIGATION to pay debts previously contracted by his indigent father for the latter's necessary support; and his written promise to pay such debts is without consideration, and therefore incapable of being enforced in law. *Id.*
 5. SALE OF AN EQUITABLE TITLE is a good consideration for a promise. *Whitbeck v. Whitbeck*, 503.
 6. CONVEYANCE BY A THIRD PERSON IS A GOOD CONSIDERATION for a promise by the grantee to pay for the land where the conveyance is made at the instance and for the benefit of the promisee. *Id.*
- See CONTRACTS, 2, 4; DEEDS 2, 4, 5, 10; NEGOTIABLE INSTRUMENTS, 9.

CONSTITUTIONAL LAW.

- AN ACT OF THE LEGISLATURE directing sales under decrees in chancery on longer credit than was allowed at the date of the contract is unconstitutional. *January v. January*, 211.

CONTRACTS.

1. ENTIRE CONTRACT.—A contract to serve for three months at an agreed salary per month, is entire, and if the service is left before the expiration of the three months no recovery can be had. *Wright v. Turner*, 35.
2. DATE AND SUBSCRIBING WITNESSES of two agreements being the same, the presumption is, until evidence is adduced to the contrary, that one forms the consideration of the other. *Aldridge v. Birney*, 183.
3. ILLEGAL CONTRACT.—A contract designed to defraud the government or to defeat the policy of a statute of the United States is illegal, and a cause of action based upon it cannot succeed in any court of justice. *Gulick v. Ward*, 389.
4. UNLAWFUL CONSIDERATION.—An obligation, executed in consideration of an agreement that the obligee would forbear to compete with the obligor in offering proposals for the carrying of the United States mail on a certain route, is founded on an unlawful consideration, and therefore void. *Id.*

See CONSIDERATION; FRAUD, 1, 2; WAGERS.

CONVERSION.

See TROVER.

CORPORATIONS.

1. ACTS DONE AT A CORPORATION MEETING of which notice was not given in the manner prescribed by its charter or by-laws are void; and where no mode of giving notice is provided by charter or by-laws, personal notice must be given to the stockholders. *Stow v. Wyse*, 99.
2. CORPORATION IS DISSOLVED BY SUFFERING ACTS destructive of the object for which it was instituted; as where a manufacturing corporation ceases to act as such, having expended all its estate and become bankrupt. *Briggs v. Penniman*, 454.
3. MERE ELECTION OF TRUSTEES to keep the corporation in existence will not prevent such dissolution. *Id.*
4. STOCKHOLDER'S LIABILITY.—Under a statute making stockholders liable for debts existing against a corporation at the time of its dissolution, to the extent of their respective shares, such liability extends not merely to the loss of the amount of the stock, but to a further sum equal to such amount, if necessary, to pay the debts. *Id.*
5. STOCKHOLDERS WHO ARE THEMSELVES CREDITORS are entitled to come in equally with the other creditors in such a case. *Id.*
6. WHETHER MERE INSOLVENCY AND INABILITY TO CONTINUE will dissolve a corporation, doubted by Spencer, senator. *Id.*
7. UNPAID STOCK is part of the assets of an insolvent corporation, without the aid of any statute, and creditors may compel its collection by the trustees by proceedings in equity. *Per* Spencer, senator. *Id.*
8. JUDGMENT OF OUSTER UNNECESSARY.—Judgment of ouster, or other direct judgment against a corporation claimed to be dissolved, is unnecessary, before a suit by creditors against the stockholders under the statute. *Id.*
9. CORPORATION MUST SUE IN ITS TRUE NAME, although contracts may be made with it by a mistaken name, if the mistake be *in syllabis et verbis*, and not *in sensu et re ipsa*, and such mistake may be averred in pleading, or shown in evidence under the general issue. *Culpeper Mfg. Soc'y v. Digges*, 708.
10. VARIANCE IN THE NAME OF A CORPORATION, by adding or omitting words, is not fatal, if there be enough to distinguish the corporation. *Id.*
11. MISNOMER OF CORPORATION, WHAT IS NOT.—A bond executed to the "president and managers of the Culpeper Agricultural and Manufacturing Society," may be sued on by the "Culpeper Agricultural and Manufacturing Society." *Id.*

See AGENCY; STATUTES, 7, 8, 9.

COSTS.

- A DECREE BEING REFORMED IN THE APPELLATE COURT, on cross appeals, each party was decreed to pay his own costs. *Ringgold v. Ringgold*, 250.

See TRUSTS AND TRUSTEES, 16.

COTENANCY.

1. DISTRIBUTEES ARE TENANTS IN COMMON of an intestate's personalty before distribution, and where one takes possession of the whole property,

unless it be sold or destroyed by him, trover will not lie against him in favor of a cotenant. *Hyde v. Stone*, 501.

2. TENANT IN COMMON CAN NOT SELL his cotenant's interest, as a partner may, and if he does so it is a conversion. *Id.*
 3. BY MARRIAGE, A WIFE'S INTEREST AS TENANT IN COMMON of personalty passes to her husband, and constitutes him a tenant in common in her stead. *Id.*
 4. IN TROVER BY A TENANT IN COMMON of chattels against his cotenant, where the defendant produces some of the articles, and admits that others have been lost or destroyed, but does not say by him, it is for the jury to determine whether or not there has been a conversion by the defendant, and the amount of the damages and a direction by the court to find a particular sum is erroneous. *Id.*
 5. ONE TENANT IN COMMON CAN NOT MAINTAIN TRESPASS against his cotenant, without actual ouster. *Harman v. Gartman*, 656.
- See HUSBAND AND WIFE, 1, 2, 3, 4, 5, 6, 7; LANDLORD AND TENANT.

COVENANTS.

1. A PERSON WHO COVENANTS TO CONVEY, as soon as he gets the title from another, must show that he has attempted to obtain that title. *Sproule v. Winant's Heirs*, 164.
2. LAPSE OF TWENTY YEARS IS CONCLUSIVE EVIDENCE of the performance of covenants contained in the condition of a bond. *Ordinary v. Steedman*, 652.

CRIMINAL LAW.

1. AN INDICTMENT SHOULD LAY THE DAY when the offense was committed. *State v. Beckwith*, 46.
2. IF THE DATE BE LAID IN BLANK, so that it does not appear whether the offense was barred by the statute of limitations or not, the judgment will be reversed. *Id.*
3. SOLICITATION OF ANOTHER TO COMMIT ADULTERY is a high crime and misdemeanor, of which the superior court has cognizance. *State v. Avery*, 105.
4. PRISONER CONFINED IN JAIL UNDER VOID WARRANT may liberate himself by breaking the prison, provided he use no more force than is necessary to enable him to effect his liberation. *State v. Leach*, 118.
5. ESCAPE OF OTHER PRISONERS LAWFULLY CONFINED for atrocious crimes, in the same room with him, in consequence of his escape, does not render him guilty of any crime. *Id.*
6. A VERBAL CONFESSION OF GUILT, induced by a delusive hope of impunity from punishment, will not be received in evidence. *State v. Guild*, 404.
7. WHEN A CONFESSION IS OBTAINED BY UNDUE INFLUENCE, a subsequent confession made by the same person is presumed to flow from the like influence, and will not be admitted in evidence, unless this presumption is first overcome by other testimony. *Id.*
8. SUBSEQUENT CONFESSIONS.—Although an original confession may have been obtained by improper means, subsequent confessions of the same or of like facts may be admitted, if the court believes, from the length of time intervening, from proper warning of the consequences of confession, or from other circumstances, that the delusive hopes or fears,

under the influence of which the original was obtained, were entirely dispelled. *Id.*

9. THE UNCORROBORATED CONFESSION of a prisoner, when proved by legal testimony, and when the *corpus delicti* is otherwise established, is sufficient to warrant his conviction of the offense confessed, though the punishment be death. *Id.*
10. "CORROBORATING CIRCUMSTANCES," used with reference to a confession, are such as serve to strengthen it, and to impress the jury with the belief of its truth. *Id.*
11. THE CONFESSION OF A BOY, twelve years and five months of age, may justify his conviction and execution for the crime of murder. *Id.*
12. MURDER IN THE FIRST DEGREE.—A premeditated design to kill need not exist for any particular length of time to constitute murder in the first degree. Hence, if the defendant, coming in view of the deceased, formed the design to kill, and walking towards him immediately executed that design without any recent provocation, it is murder in the first degree. *Whiteford v. Commonwealth*, 771.
13. KINDS OF HOMICIDES SPECIFIED IN THE STATUTE as constituting murder in the first degree, do not exclude other kinds of willful, deliberate, and premeditated killing. *Id.*
14. INTERPOLATION OF "SUCH" BEFORE THE WORDS "WILLFUL, DELIBERATE, AND PREMEDITATED," in the statutory definition of murder in the first degree, is improper. *Id.*
15. SECOND DEGREE.—Homicide perpetrated through criminal carelessness, but not from willful design, is murder of the second degree. *Id.*

See LIBEL, 3.

CY PRES.

See WILLS, 6.

DAMAGES.

1. IN TROVER THE MEASURE OF DAMAGES is the value of the property at the time of the conversion, with interest to the date of the trial, in the discretion of the jury. *Sanders v. Vance*, 167.
 2. FOR AN ASSAULT AND BATTERY.—In an action of damages, by a parent, for an assault and battery upon his daughter, the jury, in estimating the amount of damages, may take into consideration the feelings of the parties and character of the family. *Trimble v. Spiller*, 189.
- See EXECUTIONS, 3; SHIPPING, 7; TRESPASS, 15; TROVER, 4.

DEBTOR AND CREDITOR.

1. CREDITOR HAS A RIGHT TO RESORT TO ALL THE PROPERTY of his two debtors for the satisfaction of a joint debt, owed by them to him, and chancery has no power to decree that if the property of one of the debtors shall not be sufficient to discharge one half the debt, the creditor shall not look to the other debtor for the deficiency. *Hoye v. Penn.*, 316.
2. A MERE CREDITOR HAVING NO LIEN can not pursue his debtor's property, which has been transferred to a third person. He must obtain a judgment before he can attack a transfer made by his debtor. *Donaldson v. Bank of Cape Fear*, 577.

See PARENT AND CHILD; SOVEREIGNTY, 1, 2, 3, 4.

DEEDS.

1. **EXECUTION AND DELIVERY OF AN ABSOLUTE DEED UPON THE LAND GRANTED** is equivalent to livery of seisin, and transfers the legal estate and possession to the grantee; and if the grantor continues to reside thereon, it must be under the grantee. *Reading v. Weston*, 89.
2. **DEED—CONSIDERATION.**—A deed executed in pursuance of a bond for a deed, to an assignee of the bond, should express the consideration received by the obligor, and not that paid by the assignee; and upon the failure of the title, the measure of damages will be the value of the land, as fixed by the consideration received by the obligor. *Sproule v. Wissant's Heirs*, 164.
3. **IF A BOND FOR LAND** is to the wife, the deed should be to her, and not to the husband. *Id.*
4. **DEED—EVIDENCE IS INADMISSIBLE TO SHOW** that the consideration expressed in a deed was not the true consideration, because the same contradicts the deed. Additional consideration may be proved, however, which is not repugnant to the one cited in the deed. *Betts v. Union Bank*, 283.
5. **DEED, WHEN IMPEACHED FOR FRAUD.**—The party to whom the fraud is imputed will not be allowed to prove any other consideration in support of the deed than the one recited. *Id.*
6. **DELIVERY IS GENERALLY ESSENTIAL TO THE VALIDITY** of a deed, but in Maryland the same is not necessary, because by legislative enactment a deed is declared to be efficient and operative from its date. *Id.*
7. **DEED BY A FEME-COVERT NOT ACKNOWLEDGED** as required by a statute is void. *Doe v. Howland*, 445.
8. **WIFE'S ACKNOWLEDGMENT AFTER HER HUSBAND'S DEATH** to a deed of land held by them jointly, made in his life-time, but not duly acknowledged, does not, by relation, make the deed operative from its execution, but gives it effect as her sole deed from the date of the acknowledgment. *Id.*
9. **RULE THAT A DEED CAN NOT BE CONTRADICTED BY PAROL** applies only between parties and privies. *Whitbeck v. Whitbeck*, 503.
10. **ACKNOWLEDGMENT OF CONSIDERATION OF A DEED** may be contradicted by parol, even by the parties to it. *Id.*
11. **A CONVEYANCE TO A MAN, HIS HEIRS AND ASSIGNS**, as long as wood grows and water runs, creates a fee simple. *Arms v. Burt*, 680.
12. **A WRITING INTENDED AS A RECONVEYANCE**, but not sealed or acknowledged, is wholly inoperative. *Id.*

See ALTERATION OF INSTRUMENTS, 2, 3, 4, 5; ESTOPPEL.

DEPOSITIONS.

See EVIDENCE, 4.

DEVISES.

See WILLS.

DIES NON JURIDICUS.

See SUNDAY.

DISCOVERY.

See EQUITY, 12, 13.

DIVORCE.

See MARRIAGE AND DIVORCE.

DOMICILE.

1. A YEAR'S SETTLEMENT, under the act of 1797, does not require that the pauper should be constantly with his family, provided their place of abode is his domicile. *Burlington v. Calais*, 691.
2. "COMING AND RESIDING WITHIN THE STATE," within the meaning of the act, does not require a coming from another state, but a coming from any place to the town, or being and residing there when the act was passed, is sufficient. *Id.*

ELECTIONS.

See EVIDENCE, 16; WAGERS.

EQUITY.

1. THE ASSIGNEE OF A BOND for the conveyance of a tract of land, for which the obligor holds a land-office certificate, may have his bill in equity to enjoin the assignee of the certificate with notice of complainant's rights, from disturbing complainant in his possession, and from selling to a purchaser without notice. *Cupps v. Irvin*, 136.
2. EQUITY—SET-OFF.—Where one obligation forms the consideration of another, and one of the parties, without performing his obligation, removes from the state, having assigned the obligation to him of the other party, the latter may be relieved in equity against a judgment recovered by the assignee. *Aldridge v. Birney*, 183.
3. PARTIES IN EQUITY.—In the case mentioned it is not necessary to make the original obligee, against whom the complainant sets up the obligation he relies on as a set-off, a party. *Id.*
4. EQUITY JURISDICTION.—When a demand, purely legal, is secured by a mortgage, equity will not enforce it further than to subject the mortgaged estate to its satisfaction; but in cases where equity has jurisdiction to rescind or enforce a contract for land, and a sale is ordered, a decree *in personam* will be entered for any balance that remains. *January v. January*, 211.
5. *IDEM*.—Courts of equity have concurrent jurisdiction with courts of law in cases of sureties against their principals. *Id.*
6. RELEASE—A DECREE FOR A RELEASE will be granted against a person having a conveyance from a common grantor of elder date, but in fact subsequently executed, to one having the elder legal title. *Nantz v. McPherson*, 216.
7. PARTNERSHIP CREDITORS IN EQUITY CAN ONLY LOOK to the surplus of their debtor's separate estate after the payment of his separate debts. *McCulloh v. Dashiell*, 271.
8. SEPARATE CREDITORS IN EQUITY CAN ONLY APPLY the surplus of a joint fund to the satisfaction of their debts after the claims of the joint creditors have been discharged. *Id.*
9. JOINT CREDITORS MAY, AT LAW, PURSUE both the joint and separate estate, to the extent of each, for the satisfaction of their joint demands, which are at law considered both joint and several. *Id.*
10. COURTS OF EQUITY DO NOT, AS AGAINST SEPARATE CREDITORS, treat a joint debt as joint and several; yet where the claims of joint creditors

do not come into conflict with the separate creditors, but only with the interests of the representatives of a deceased partner, equity will, as against such representatives, decree to joint creditors a satisfaction of their claims by considering them joint and several. *Id.*

11. REMEDY AT LAW BEING GONE, chancery will not revive it in the absence of any accident, fraud, or mistake. *Waters v. Riley*, 302.
12. DISCOVERY—A DEFENDANT IN EQUITY is not bound to make any discovery in answering a bill that would subject him to a criminal prosecution. It must appear, however, from the bill or plea that his answers would subject him to punishment. *Wolf v. Wolf*, 313.
13. DISCOVERY MAY BE HAD, not only to support an action then instituted, but as auxiliary to the maintenance of an action then contemplated to be brought. *Id.*
14. EQUITY HAS JURISDICTION OF CONTRIBUTION among numerous parties; hence, creditors in such a case may sue in equity. *Briggs v. Penniman*, 454.
15. AGREEMENT TO PURCHASE LAND WITH PAYMENT of the purchase-money gives an equitable title, which a court of chancery will enforce. *Whitbeck v. Whitbeck*, 504.
16. WHERE DONOR DESTROYED VOLUNTARY DEED fairly obtained, after it was delivered to the grantee, but before it was registered, a court of equity will compel such donor to convey the same property to the donee. *Tolar v. Tolar*, 598.
17. PAROL VARIATION OF WRITTEN CONTRACT CONCERNING LAND.—A written contract for the sale of land varied by parol in a material particular will not be enforced in equity, as where the written contract requires the vendee to search for coal, and if he finds it in paying quantities within a given time, to pay an increased price for the land, and the time for the search is afterwards extended by parol. *Heth v. Wooldridge*, 751.

See EXECUTIONS, 12, 13; VOLUNTARY CONVEYANCES.

ESTATES OF DECEASED PERSONS.

1. LIABILITY OF A TESTATOR'S ESTATE FOR DEBTS OF PARTNERSHIP CONTINUED AFTER HIS DEATH.—Where a testator, by his will, directs that a partnership, of which he was a member, should be continued after his death, and the profits at the end of a specified time distributed among his devisees, the creditors of the partnership have no lien on the general assets of the estate of the deceased in the hands of his devisees. *Pitkin v. Pitkin*, 111.
2. REMEDY OF SUCH CREDITORS is by claim against the executor, to be pursued like other general claims against the testator's estate, and not in chancery. *Id.*

ESTOPPEL.

ESTOPPEL BY RECITALS IN DEED.—A party who has admitted a fact in his deed, is estopped not only from disputing the deed, but every fact which it recites, and so are all persons claiming under and through him. *Stow v. Wyse*, 99.

ESTREPEMENT.

See WASTE, 4.

EVIDENCE.

1. WHERE THE DEFENDANT OFFERED AN ANSWER in chancery in evidence, and read a part of it and of the exhibits, consenting that the plaintiff might read the whole, the latter may, at any stage of his argument, refer to, and read any or all of the answer and exhibits. *Bumpass v. Webb*, 34.
2. ONE WHOSE NAME IS FORGED to a note is a competent witness in an action by the transferee of the note against the transferor on the original liability. *Pope v. Nance*, 60.
3. THE RECORD, VERDICT, AND JUDGMENT, on a plea of *non est factum* in an action by the transferee against the apparent maker of the forged note, are evidence in an action by the transferee against a partnership on the original liability, the consideration of the transfer, the partner passing the note having knowledge of the action and being consulted in its management. *Id.*
4. MAGISTRATE BEFORE WHOM DEPOSITION IS TAKEN must, under statute of Connecticut certify the reason for taking it; and his omission to do so can not be supplied by parol evidence. *Reading v. Weston*, 89.
5. DECLARATIONS MADE BY PERSON WHILE OCCUPYING LAND are admissible to show the nature and extent of his occupation; but such declarations have no effect when made by one who occupied under absolute deed from former owner. *Id.*
6. DECLARATIONS OF PERSON WHILE IN POSSESSION OF LAND, against his own title, are admissible against him, and all persons claiming under him. *Norton v. Pettibone*, 116.
7. IN AN ACTION FOR A BREACH OF PROMISE OF MARRIAGE, evidence of seduction is admissible. *Whalen v. Layman*, 157.
8. THE BEST EVIDENCE of which the nature of the case is capable must be given. *Jackson v. Cullum*, 158.
9. THE CONTENTS OF LOST INSTRUMENTS or records may be proved by parol. *Id.*
10. INJUNCTION OF SECRECY by the defendant to a witness, is no reason why such evidence should not be admitted to show the publication of slanderous words. *McGowan v. Manifee*, 178.
11. EVIDENCE ADMISSIBLE AGAINST AN AGENT is also admissible against the principal who comes into court to support the act of the agent. *Thompson v. Chauveau*, 246.
12. ALLEGATIONS IN AN ANSWER RESPONSIVE to the bill are evidence for the defendant, but averments of new matter, in avoidance, are not. *Ringgold v. Ringgold*, 250.
13. INQUISITION OF LUNACY is *prima facie*, but not conclusive, evidence against persons who are not parties to it. *Den v. Clark*, 417.
14. AN INQUISITION OF LUNACY may be impugned by a third person by any competent evidence tending to show that the alleged lunatic was of sound mind at the period embraced in the inquisition. The procedure, technically called a traverse of the inquisition, need not be first pursued. *Id.*
15. ALLEGATIONS IN ANSWER NOT EVIDENCE, WHEN.—Allegations in the answer of stockholders of a dissolved corporation to a bill filed by creditors to the effect that the stockholders are also creditors, are not evidence if not responsive to the bill, and must be proved if material. *Briggs v. Penniman*, 454.

16. CERTIFICATE OF ELECTION IS ONLY PRIMA FACIE EVIDENCE, and does not preclude collateral inquiry into the correctness or legality of the canvass. *Rust v. Gott*, 497.
 17. ADMISSION BY A PARTNER, AFTER DISSOLUTION, either of an account or of a fact, is not competent evidence, in this state, against his copartner. *Baker v. Stackpole*, 508.
 18. SUCH ADMISSION IS COMPETENT EVIDENCE IN ENGLAND and in some of the states, with respect to joint contracts made during the partnership. *Id.*
 19. IN AN ACTION OF DETINUE FOR A SLAVE, the record of a recovery had by the same plaintiffs in a former action of detinue for the same slave is not evidence against the title of the defendant in the second action, who had, pending the former action, purchased such slave at an execution sale. *Briley v. Cherry*, 561.
 20. RECEIPT IN FULL OF ALL DEMANDS IS PRIMA FACIE EVIDENCE of a settlement between the parties, and of the payment of the balance; and it is not merely evidence of the sum specified in it. *Reid v. Reid*, 570.
 21. PAROL EVIDENCE IS ADMISSIBLE to show agreement that part of the property, for which a promissory note was given, might be returned if not approved of. Such evidence tends, not to vary the terms of the note, but to establish a right of set-off. *Barnes v. Shelton*, 642.
 22. ENTRIES IN A TRADESMAN'S BOOKS, transferred from his slate, without showing who transferred them, or that they were transferred daily, are not admissible in evidence. *Drummond v. Hyams*, 649.
 23. THE REJECTION OF EVIDENCE OF A BREACH of condition and abandonment of lessee, is erroneous, if offered in connection with proof of re-entry for condition broken. *Arms v. Burt*, 680.
 24. DECLARATIONS OF THE OVERSEER OF THE POOR and agent of a town, made while executing his agency, are admissible against the town. *Burlington v. Calais*, 691.
- See CRIMINAL LAW, 6, 7, 8, 9, 10, 11; JUDGMENTS, 2; NEW TRIALS.

EXECUTIONS.

1. A SHERIFF WHO, under an execution, sells the property of a stranger to the writ, is liable in trover or trespass without demand. *Jamison v. Hendricks*, 131.
2. A PURCHASER AT SUCH SALE, who exerts acts of ownership over the property bought, after learning that the property belongs to a stranger to the writ, is liable in trover without demand. *Id.*
3. DAMAGES IN TROVER may be recovered for injury done to the goods as well as for their value. *Id.*
4. FIERI FACIAS—JUSTIFICATION OF LEVY.—To justify a levy upon property as belonging to a person alleged to have conveyed the same to defraud his creditors, the judgment upon which the *feri facias* issued must be produced. *Sanders v. Vance*, 167.
5. A MORTGAGEE MAY MAINTAIN TROVER against the sheriff and the plaintiff in execution, for seizing the mortgaged property under a *feri facias* issued against the mortgagor. *Id.*
6. EXECUTION SALES—DEFECTS IN PROPERTY SOLD, WHO LIABLE FOR.—The defendant in execution is not bound to disclose defects in the property exposed to sale by the sheriff, and a failure to disclose the same will not render him liable to an action of deceit. *Hart v. Hampton*, 186.

7. EVIDENCE—SHERIFF'S SALES.—It is sufficient, in proving title under a sheriff's sale, that a copy of the judgment and so much of the record as shows that the court had jurisdiction of the defendant, be produced. *McGuire v. Kouns*, 187.
8. SHERIFF'S DEED—RECITALS IN.—A reference to the execution and a recital of its principal parts in a sheriff's deed, is a sufficient compliance with an act of the assembly, which directs the sheriff to recite in his deed the execution under which he acted in making the sale. *Id.*
9. IDEM.—In the recital of an execution in a sheriff's deed, an omission of the names of two of the defendants is immaterial, it being recited that the interest of all the defendants, described as the heirs of R. J., was sold and conveyed. *Id.*
10. POSSESSION—GROWING CROPS.—A person can not be in possession of land, and another of the corn growing on it. *Foster v. Fletcher*, 208.
11. SHERIFF'S RETURN—IF REPUGNANT, WHAT PORTION PREVAILS.—In a sheriff's return of the execution of a writ of possession, certifying he had delivered the possession of the land, a clause stating he had excepted for the defendant the growing crop thereon, is repugnant and void, and plaintiff is entitled to possession of all. *Id.*
12. EXECUTION SALES—EQUITY HAS JURISDICTION TO SET ASIDE sales of land under execution, where fraud exists, but in so doing it does not act as a revising court over the records of a court of law in executing their process, but it will treat all the proceedings at law as valid, although erroneous, and will relieve against the consequence thereof, because the rights acquired thereby can not be retained in conscience, but the purchaser will not be compelled to do equity until he receives equity. *Bligh's Heirs v. Tobin*, 219.
13. IDEM—RELIEF GRANTED BY COURTS OF EQUITY in avoiding execution sales on the ground of fraud, is not limited to the period provided by statute within which courts of law may correct the abuse of its process. *Id.*
14. IDEM—PURCHASE AT, BY ATTORNEY FOR PLAINTIFF.—Whether a purchase by the attorney for the plaintiff in execution, of lands sold at a sheriff's sale, is invalid or not, such purchase is a circumstance to induce the court to examine the same with greater strictness. *Id.*
15. INADEQUACY OF PRICE, *per se*, may not be sufficient to overturn a sheriff's sale, yet it is a circumstance that will be considered and weighed with other circumstances from which fraud may be inferred. *Id.*
16. ACTS OF ONE PARTNER in effecting a fraudulent purchase of lands at sheriff's sale is binding on all the partners. *Id.*
17. PURCHASER WITHOUT NOTICE OF FRAUD, PROTECTED.—A vendee, without notice of a fraudulent purchase at sheriff's sale, is not affected thereby, but the purchaser under the execution must account for the proceeds of his sale to the former owner. *Id.*
18. REDEMPTION IN EQUITY, WHEN ALLOWED.—Equity may permit a redemption of land sold under execution, on the ground of improper conduct on the part of the sheriff and purchaser, although a court of law would not set aside the sale. *Id.*
19. PURCHASERS AT SHERIFFS' SALES are not affected by irregularities of the officer, but the officers are liable to the party injured; but where the purchaser conducts the sale, and knows of the irregularities, equity may compel him to surrender the title on receiving his money back. *Id.*

20. AN EXECUTION TO BE LEVIED ON GOODS and chattels does not authorize the seizure and sale of real estate. *Thompson v. Chauveau*, 246.
21. AMENDMENT—SHERIFF'S RETURN TO A FIERI FACIAS may be corrected so as to make the same conform to the truth, and it is the sheriff's duty to so correct it. *Berry v. Griffith*, 309.
22. SHERIFF CAN NOT SELL PROPERTY that has not been levied upon, but a general description in the schedule and advertisement of sale is sufficient. *Id.*
23. SHERIFF'S RETURN should be regular for the security of purchasers, and should describe the premises with precision, but it is sufficient if the property sold can be clearly identified. *Id.*
24. PROPERTY LEVIED UPON MAY BE DIVIDED, and a part sold, if such part is sufficient to satisfy the judgment. *Id.*
25. LAND WAS NOT LIABLE TO SALE ON EXECUTION at common law for the debt of a private creditor. *Jones v. Jones*, 327.
26. FOR A DEBT DUE THE STATE OR THE KING, land could always be taken in execution. *Id.*
27. KING'S DEBT IS PREFERRED in execution, and in the administration of decedents' estates, to that of a citizen. *Id.*
28. KING'S PREFERENCE devolved upon the state at the revolution. *Id.*
29. STATE HAS A LIEN on the lands of its judgment-debtor, from the commencement of the action under our statute. *Id.*
30. DEBTOR'S WHOLE REAL ESTATE IS LIABLE in this state, by statute, to be taken in execution. *Id.*
31. FIERI FACIAS BOUND THE DEFENDANT'S GOODS from its *teste* at common law. *Id.*
32. UNDER THE STATUTE OF FRAUDS, FIERI FACIAS binds the defendant's goods only from its delivery to the sheriff as respects purchasers and creditors. *Id.*
33. AS TO THE PARTY HIMSELF, notwithstanding the statute, judgment and *feri facias* still relate to the first day of the term, or at least to the *teste* of the writ. *Id.*
34. FIERI FACIAS TESTED in the defendant's life-time, may be executed after his death. *Id.*
35. NO DISTINCTION IS MADE between realty and personalty under the statute subjecting land to sale on execution, as it has been construed here, so far as the effect of an execution tested in the debtor's life-time is concerned; so that the debtor's land may be sold after his death under a *feri facias* levied or tested before. *Id.*
36. LAND IS CHANGED INTO PERSONALTY by an execution sale, and, the debtor being deceased, the surplus goes to his personal representative, and not to his heir. So held by the chancellor, but the court of appeals held otherwise. *Id.*
37. MUTATION OF REALTY INTO PERSONALTY by judicial proceedings discussed by the chancellor. *Id.*
38. MONEY IN THE HANDS OF A SHERIFF or a third person, can not be taken under a *feri facias*. *Id.*
39. SHERIFF HOLDING MONEY MADE ON EXECUTION from another court can not be directed by this court to bring it in for distribution. *Id.*
40. LAND COULD NOT BE SOLD ON EXECUTION at common law, but it is otherwise in this state by statute. *Duvall v. Waters*, 350.

41. TITLE PASSES BY THE SALE of land under a *feri facias*, but there must be some written and recorded evidence of the sale. *Id.*
42. RETURN OF A SALE OF LAND, on execution, must be made, describing the property with sufficient precision to enable it to be identified. *Id.*
43. TECHNICAL ACCURACY IN THE DESCRIPTION is unnecessary in such a case. *Id.*
44. PURCHASER AT SHERIFF'S SALE AND THE DEFENDANT IN EXECUTION are not privies in estate, for the former succeeds also to the rights of the plaintiff; and privies in estate are those only who come in under their vendor. *Briley v. Cherry*, 561.
45. SHERIFF'S SALE AT AUCTION, under execution, where puffers are employed, or a combination of bidders is formed for the purpose of stifling competition, is void at law, and a deed executed in pursuance of it conveys no title; but an association of bidders fairly formed, because of the magnitude of the purchase, or for other proper cause, does not vitiate such sale. *Smith v. Greenlee*, 564.
46. PURCHASER OF GROUND RENT, at sheriff's sale, can maintain covenant for the rent against the owner of the ground out of which it issues. *Streaper v. Fisher*, 604.
47. THE LEVY OF AN EXECUTION will generally control all subsequent proceedings. Therefore, if the levy be upon a rent charge, and the sheriff sell the lot on which it is charged, no objection at the proper time being made, the rent charge passes. *Id.*
48. DEED VOID FOR UNCERTAINTY.—Sheriff's deed which describes the land conveyed as "all that plantation or tract of land lying in Sumner district," is void for uncertainty; and neither the sheriff's advertisement, nor his oral testimony, is admissible in evidence to show what land was meant to be conveyed. *Broughton v. Birchmore*, 654.
49. A SHERIFF IS NOT A TRESPASSER when he levies an execution upon the property of the maker of a note under a judgment recovered by an indorsee, although the maker forbids the sheriff to proceed, and shows him a discharge from the nominal plaintiff. *Lampson v. Fletcher*, 676.
50. A LEVY OF AN EXECUTION UPON ALL THE RIGHT, title, and interest of the defendant in and unto a certain tract of land particularly described, is void. *Arms v. Burt*, 680.
51. ISSUING ELEGIT AFTER FL. FA.—Under our statute relating to executions, a creditor may sue out an *elegit* on his judgment or decree after a *fi. fa.* returned satisfied in part only, without prosecuting the *fi. fa.* to a return of "*nihil*" as to the residue. *Coleman v. Cocke*, 757.
52. WHERE THERE ARE TWO DECREES ON THE SAME DAY against a defendant's land, the whole, and not a moiety, should be directed to be sold, for each would take a moiety if they were extendible at law. *Id.*

See INTERVENTIONS, 1; TROVER, 3.

EXECUTORS AND ADMINISTRATORS.

See FRAUDULENT CONVEYANCES 7; STATUTE OF LIMITATIONS, 2, 5.

FEME-COVERTS.

A FEME-COVERT, IN RESPECT TO HER SEPARATE ESTATE, is to be deemed a *feme-sole* only to the extent of the power clearly given by the instrument by which the estate is settled. *Lancaster v. Dolan*, 625.

See DEEDS, 7, 8.

FORCIBLE ENTRY AND DETAINER.

1. **FORCIBLE ENTRY, WHAT IS.**—Entry by night into a house from which another has removed, leaving a few articles therein, the house being fastened by nails over the latches, and putting a tenant into possession with directions to prevent any one from taking possession thereof, and the actual use of threats by such tenant towards persons sent by the one who had removed, constitute a forcible entry, or at least a forcible detainer. *Evill v. Conwell*, 138.
2. **WHAT CONSTITUTES FORCIBLE ENTRY.**—Where a man, at the time of his entry, by his behavior or speech, gives those in possession cause to fear that he will do them bodily harm unless they give way to him, his entry will be deemed forcible. *State v. Bennett*, 663.
3. **WHERE A PERSON ENTERS PEACEABLY**, but turns the party out of possession by force, or frightens him out by threats, he is guilty of a forcible entry; and one who enters peaceably in company with another who enters forcibly, will be held guilty of a forcible entry. *Id.*
4. **DEFENDANT'S TITLE IS NOT ADMISSIBLE IN EVIDENCE** under an indictment for forcible entry and detainer. *Id.*
5. **OPERATION OF WRIT OF RESTITUTION** is not suspended by appeal where such writ was awarded on conviction of forcible entry and detainer. *Id.*

FORGERY.

See NEGOTIABLE INSTRUMENTS, 1, 2.

FRAUD.

1. **IN COVENANT FOR THE BREACH OF A CONTRACT**, accompanied with fraud, the fraud may be averred in the declaration, and may be made the subject of inquiry in the action. *Cutler v. Cox*, 152.
2. **IN CASE FOR FRAUD** for the breach of a contract, the gist of the action is the fraud committed at the time of the breach. *Id.*
3. **COMBINATION TO DEFRAUD CREDITORS.**—Where creditors attack the validity of a judgment entered upon a bond given by a father in failing circumstances, to a son, soon after the latter's majority, on the alleged consideration of services rendered, the creditors may show that, on a sale of the father's goods by the sheriff, the son had claimed and retained several of the articles levied on. *Reitenbach v. Reitenbach*, 638.
4. **WHERE THE FRAUDULENT COMBINATION IS PROVED**, evidence of the declarations of the father, in his son's absence, that the bond was without consideration and to keep off creditors, is admissible. *Id.*

See DEEDS, 5; PLEADING AND PRACTICE, 10, 11; TRUSTS AND TRUSTEES, 17;

VENDOR AND VENDEE.

FRAUDULENT CONVEYANCES.

1. **FRAUDULENT CONVEYANCE** is void against creditors. *Duwall v. Waters*, 350.
2. **AN ASSIGNMENT MADE TO DELAY CREDITORS** can not be questioned by one who took a dividend under it. *Adlum v. Yard*, 608.
3. **A PRESUMPTION THAT THE OBJECT OF AN ASSIGNMENT** for the benefit of creditors has been accomplished or abandoned after the lapse of seventeen years, will not arise without corroborating circumstances. *Id.*
4. **A MORTGAGEE IS A PURCHASER** within the intent of the statute; 27 Eliz. c. 4. *Lancaster v. Dolan*, 625.

5. VOLUNTARY CONVEYANCES ARE NOT VOID against subsequent purchasers in Pennsylvania, in virtue of that statute. *Id.*
6. A VOLUNTARY DEED DULY RECORDED, in the absence of actual fraud, is as valid against a subsequent purchaser as one given for a valuable consideration. *Id.*
7. ADMINISTRATOR CAN NOT IMPEACH THE DEED of his intestate as fraudulent against creditors, although there be no other fund from which their debts can be paid. *Martin v. Martin*, 675.
8. POSSESSION RETAINED BY A MORTGAGOR UNDER A RECORDED MORTGAGE of chattels, does not render it fraudulent nor void. *Glasscock v. Batton*, 703.
9. ABSOLUTE BILL OF SALE BY A MORTGAGOR TO THE MORTGAGEE of the mortgaged property releases the mortgage, and if not recorded, and the bargainor retains possession, such bill of sale is void as to creditors and subsequent purchasers. *Id.*
10. SUBSEQUENT PURCHASER MAY COME INTO EQUITY for relief where the bargainee in such prior bill of sale releasing a recorded mortgage has obtained possession of the mortgaged property. *Id.*
11. TEMPORARY RETENTION OF POSSESSION by the vendor does not render a conveyance void as against subsequent purchasers, if possession is delivered before any one is deceived or has become a purchaser. *Id.*
12. RETENTION OF POSSESSION UNDER A SUBSEQUENT CONVEYANCE for value does not make good, as against the vendee, a prior conveyance fraudulent and void as to such vendee. *Id.*
13. CONVEYANCE TO A SON BY A FATHER who is deeply indebted, made without a valuable consideration, is fraudulent as to creditors who obtained judgments against the father after the conveyance was made. *Coleman v. Cocke*, 757.
14. FATHER PURCHASING LAND AND TAKING DEED IN SON'S NAME.—Where a father, being deeply indebted, purchases land and has the conveyance made to his son, who gives no consideration therefor, the transaction may be impeached for fraud by a creditor of, or purchaser from, the father. *Id.*
15. GIVING AWAY AN EQUITABLE ESTATE to a child, by a father who is largely indebted, is as much a fraud as the conveyance of the legal title under similar circumstances would be. *Id.*

See BONA FIDE PURCHASERS, 3, 4.

FREIGHT.

See SHIPPING, 1, 2, 3, 4.

GAMING CONTRACTS.

See WAGES.

GARNISHMENT.

See ATTACHMENT.

GROWING CROPS.

See EXECUTIONS, 10, 11; LANDLORD AND TENANT.

GUARANTY.

1. A PROMISE TO INDEMNIFY ANOTHER for any loss, if he will act as surety on a third person's bond, is binding. But such promise must be in writing. *Brown v. Adams*, 36.

2. **SUCH PROMISE NEED NOT BE AVERRED** to be in writing; it is sufficient if the writing be produced on the trial. *Id.*
3. **ASSUMPTION OF ANOTHER'S DEBT, WHEN BINDING.**—Where a vendee of land, having promised to pay for the same, conveys to another who assumes the debt, and subsequently makes a verbal promise to the creditor to pay it, this is not a promise to pay another's debt, and the promisee can maintain an action thereon. *Whitbeck v. Whitbeck*, 503.

GUARDIAN AND WARD.

1. **SUIT BROUGHT IN NAME OF GUARDIAN**, although he describes himself as guardian, is his suit, not that of his ward; and, in such suit, evidence of the ward's title is irrelevant. *Doud v. Wadsworth*, 567.
2. **A GUARDIAN OF A SPENDTHRIFT** has authority, as such, to sell trees standing on his ward's land, and may receive the money, or take notes therefor, payable to himself. *Thompson v. Boardman*, 684.
3. **THE WARD CAN NOT, AFTER THE GUARDIANSHIP CEASES**, discharge such notes; more especially if the ward is indebted to the guardian for advances made. *Id.*
4. **IF NONE OF THE TIMBER HAD BEEN TAKEN** during the guardianship, and after its termination the ward had refused to allow it to be taken, such facts might constitute a good defense to an action on the note. *Id.*
5. **GUARDIAN'S POSSESSION OF WARD'S LAND.**—Guardian in socage and statutory guardians in this state have possession of the land of their wards, and they, and not their wards, must bring trespass for injuries thereto. *Truss v. Old*, 748.
6. **CUTTING TREES ON AN INFANT'S LAND BY THE GUARDIAN'S PERMISSION** is not trespass, and the ward can not maintain an action therefor, even after the guardianship has terminated, but must look to his guardian for compensation. *Id.*
7. **TREES CUT ON LAND HELD TEMPORARILY** by another become personal property, and belong to the owner of the inheritance, and he may bring trover for their removal. *Id.*
8. **GUARDIAN MAY SELL TREES CUT OR THROWN DOWN** on his ward's land, and if any wrong is done he must compensate the ward, who can not bring trover against the purchaser. *Id.*

HIGHWAYS.

1. **SURVEY OF HIGHWAY MUST DEFINE ITS BOUNDARIES** with reasonable certainty, and a survey of a mere line extending in length only, without breadth, is not competent as evidence to prove the existence of a highway. *Beardles v. French*, 86.
2. **NON-USER OF A HIGHWAY FOR MANY YEARS** is *prima facie* evidence of a release of the right to the person over whose land it once ran. *Id.*
3. **WANTON AND UNNECESSARY DESTRUCTION OF PROPERTY** by persons removing obstructions from highway, is a trespass for which they are liable to an action. *Id.*

HOLIDAYS.

See SUNDAY.

HOMICIDE.

See CRIMINAL LAW, 11, 12, 13, 14, 15.

HUSBAND AND WIFE.

1. A CONVEYANCE TO HUSBAND AND WIFE, made after their marriage, makes them tenants of the entirety, and not joint tenants. *Den v. Hardenbergh*, 371.
2. A GRANT TO A HUSBAND AND WIFE AND A THIRD PERSON vests in the husband and wife an undivided one half, as tenants by entirety, and the other half to such third person. *Id.*
3. A TENANCY BY ENTIRETIES CAN NOT BE SEVERED by the act of either the husband or wife, nor by a fine or common recovery against either of the spouses, nor can partition be made of an estate held by such tenancy. *Id.*
4. THE SURVIVOR OF A TENANCY BY ENTIRETIES enjoys and is vested with the title to the whole property, not because any new or farther interest or estate becomes vested upon the death of his co-tenant, but because the original conveyance vested each grantee with the entirety.
5. A CONVEYANCE TO A MAN AND WOMAN THEN UNMARRIED vests an estate in them as joint tenants, or as tenants in common, and this estate will not be changed by their subsequent marriage. *Id.*
6. A STATUTE ENACTING "That no estate shall be considered and adjudged to be an estate in joint tenancy, except it be expressly set forth in the grant creating such estate," etc., does not apply to conveyances or devises to a husband or wife, because they do not hold in joint tenancy, but as tenants of the entirety. *Id.*
7. HUSBAND AND WIFE ARE NOT JOINT TENANTS, or tenants in common, of land conveyed to them jointly, being seised *per tout*, but not *per my*; hence they must join in a conveyance thereof, and a conveyance by one is void. *Doe v. Howland*, 445.
8. POST-NUPTIAL AGREEMENT BETWEEN HUSBAND AND WIFE, made upon sufficient consideration, will be enforced in equity. *Liles v. Fleming*, 585.
9. WIDOW'S RIGHT TO A CHILD'S PART OF HER HUSBAND'S PERSONAL ESTATE is one which the law gives, and an intention to exclude that right must be shown either by express words or by a manifest implication, otherwise she is entitled to the child's part. *Id.*

See CONFLICT OF LAWS.

INDICTMENTS.

See CRIMINAL LAW, 1, 2.

INJUNCTIONS.

1. INJUNCTION AGAINST TRESPASS LIES, IN ENGLAND, only in strong cases of destruction or irreparable mischief. *Duvall v. Waters*, 350.
2. INJUNCTION DOES NOT LIE TO PREVENT A MERE TRESPASS, not instant and irreparable, when no suit or action has been instituted involving the title. *Id.*
3. INJUNCTION AGAINST DEBTOR DISPOSING OF PROPERTY.—Only a judgment creditor can have the assistance of a court of equity to control, prevent, or interfere with a debtor's disposition of his property. *Rhodes v. Cousins*, 715.
4. WHAT NECESSARY TO AFFECT LAND OR PERSONALTY.—To affect the debt-

or's land, in such a case the creditor must have judgment and take his *elegit*, and to affect personalty he must have judgment and execution issued. *Id.*

See WASTE, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18.

INQUISITION OF LUNACY.

See EVIDENCE, 13, 14.

INSURANCE—FIRE.

1. IN THE CONSTRUCTION OF POLICIES OF FIRE INSURANCE, the same strictness is not to be observed as in the construction of policies of marine insurance. *Jolly v. Baltimore E. Soc'y*, 238.
2. POLICY OF INSURANCE BEING SILENT on the subject, the determination as to whether certain repairs or alterations in the property insured were such as the insured were authorized to make, as being necessary for the use of the property, and whether the same were made in the usual way, are questions of fact for the jury. *Id.*
3. ALTERATIONS AND REPAIRS IN PROPERTY, insured against fire, do not *per se* change the risk, and whether the risk has been increased thereby is a question of fact for the jury. *Id.*

INTEREST.

See TRUSTS AND TRUSTEES, 10, 11, 12.

INTERVENTION.

1. WHERE A PURCHASER AT A SHERIFF'S SALE INTERVENES to maintain its validity, the court may order him to restore possession. *Thompson v. Chauveau*, 246.
2. AN INTERVENOR CAN NOT RETARD the trial of a cause in which he interpleads. *Walker v. Dunbar*, 248.

JUDGMENTS.

1. IN RENDERING JUDGMENT NUNC PRO TUNC, the court can not resort to any evidence to show what the judgment should be, other than that furnished by the record. *Draughan v. Tombeckbee Bank*, 38.
2. THE DECREE OF THE COUNTY COURT directing the sale of land of an intestate's estate is evidence against third persons concerning the land sold. And this, although the whole record in that behalf is not produced, such decree being conclusive until regularly set aside. *Richardson v. Hobart*, 70.
3. A JUDGMENT WILL NOT BE REVERSED because a motion for a new trial made on the ground that the verdict was against evidence, unless it is clear that the verdict was not warranted by the evidence. *Lambert v. Sandford*, 149.
4. A JUDGMENT LIEN attaches on land at the date of the judgment. *Jones v. Jones*, 327.
5. JUDGMENT LIEN EXISTS AFTER THE DEATH of a party has abated the cause, but execution can not issue until the judgment has been revived. *Id.*
6. RECOVERY OF JUDGMENT IN TRESPASS *de bonis asportatis* divests the plaintiff of his property in the goods. Therefore such judgment is a bar to an action of *indebitatus assumpsit* against any one, for the proceeds of AM. DEC. VOL. XVIII—52

the sale of the goods, which were the subject of the trespass. *Floyd v. Browne*, 602.

7. MONEY IN THE SHERIFF'S HAND under a sale of lands, sufficient to satisfy a judgment prior to that on which the lands were sold, is not *per se* a satisfaction of such prior judgment. *Bank of Pa. v. Winger*, 633.
8. A PRIOR JUDGMENT-CREDITOR may waive his priority in favor of a subsequent judgment-creditor, without extinguishing his judgment. And if the subsequent judgment-creditor becomes the assignee of the prior judgment, he succeeds to all the rights of the assignor. *Id.*

See AMENDMENTS.

JUDICIAL LIABILITY.

See OFFICE AND OFFICERS.

JUDICIAL SALES.

See EXECUTIONS.

JURISDICTION.

1. WAIVER OF EXCEPTIONS TO JURISDICTION OF COURT.—When the want of jurisdiction arises from the want of legal notice, appearance and submission of the party waive the exceptions to the jurisdiction; but when want of jurisdiction over the subject-matter appears from the record, the defect can not be supplied by the submission of the party. *Perkins v. Perkins*, 120.
2. WHERE THE END IS CONCEDED, the means of arriving at it are granted. *Cole's Widow v. His Executors*, 241.

JURY TRIAL.

See PLEADING AND PRACTICE, 14.

LANDLORD AND TENANT.

WHERE ONE LETS LAND ON SHARES to another, the parties are tenants in common of the crop. *De Mott v. Hagerman*, 443.

See STATUTE OF FRAUDS, 1.

LEASES.

See ALTERATION OF INSTRUMENTS, 1, 6.

LIBEL

1. LIBELOUS WRITING.—Letter addressed to the wife of another, importing that she had acted libiduously toward the writer, and invited him to adulterous intercourse with her, and which was sent to her with intent to insult and abuse her, to seduce and debauch her affections from her husband, and to bring her into hatred and contempt, is libelous. *State v. Avery*, 105.
2. SENDING SUCH A LETTER to the person to whom it is addressed is a publication of the libel. *Id.*
3. LIBEL AGAINST AN INDIVIDUAL is an indictable offense. *Id.*

LIENS.

See JUDGMENTS, 4, 5.

LIS PENDENS.

1. PENDENCY OF AN ACTION OF SLANDER does not render a sale of the de-

defendant's land void as to the plaintiff, though the defendant has no other property to satisfy the judgment subsequently recovered. *Ray v. Roe*, 159.

2. PENDENCY OF AN ACTION is constructive notice of the matter involved in the suit, and a purchaser of the property which is the immediate object of the pending action will be affected by it, as a purchaser with notice. *Id.*

See REAL ESTATE, 1.

LUNACY.

See EVIDENCE, 13, 14.

MANDAMUS.

1. NO MANDAMUS LIES TO COMPEL a city council to admit a member whom they do not think duly elected. *Mayor v. Morgan*, 232.
2. A SHERIFF WHO SERVES A DISTINGAS to compel obedience to a mandamus in such case is a trespasser. *Id.*

MARRIAGE AND DIVORCE.

1. MARRIAGE IS A CIVIL CONTRACT, as well as a religious vow, which, while it is invalidated by want of consent, is, if valid, obligatory upon the parties during their joint lives, and can not be cast off at pleasure. *Fornhill v. Murray*, 344.
2. SOLEMNIZATION IN THE FACE OF THE CHURCH, or by a clergyman, is the most correct, if not the only legal, mode of contracting marriage in Maryland. *Id.*
3. COHABITATION, REPUTATION, and the fact that the parties have represented themselves as husband and wife, are generally sufficient evidence of a marriage; the only exceptions are in prosecutions for bigamy and actions of criminal conversation. *Id.*
4. DIVORCE IN THIS STATE can be granted only by an act of the legislature. *Id.*
5. JURISDICTION CONCERNING ALIMONY has been devolved on the court of chancery. *Id.*
6. COUNTY COURT MAY INQUIRE INTO THE VALIDITY of a marriage in certain cases. *Id.*
7. COURT OF CHANCERY CAN NOT DETERMINE THE VALIDITY of a marriage, except when procured by abduction, terror, or fraud. *Id.*
8. VOIDABLE MARRIAGE CAN BE QUESTIONED in England only by a direct suit for that purpose in the spiritual court. *Id.*
9. AFTER THE DEATH OF ONE OF THE PARTIES to a marriage, no judicial proceeding can be had to inquire into its validity. *Id.*
10. MARRIAGE QUESTIONED AFTER DEATH OF PARTY, WHEN.—The validity of a marriage may be inquired into after the death of a party where it, or the legitimacy of the issue, forms a link in the chain of title. *Id.*
11. MARRIAGE VALID WHERE CELEBRATED is valid everywhere. *Id.*
12. CHANCELLOR MAY DETERMINE A QUESTION OF LEGITIMACY in a chain of title, without the aid of a jury, where the proof is clear. *Id.*

See EVIDENCE, 7.

MISTAKE

1. MONEY OVERPAID ON A NOTE MAY BE RECOVERED BACK, unless it clearly

appears to have been voluntarily paid, with full knowledge that it was not due. *Waite v. Leggett*, 441.

2. POSSESSION OF THE MEANS OF DISCOVERING THE MISTAKE will not deprive the party of his right of recovery in such a case, if there was a mistake in fact. *Id.*
3. OVERCHARGE OF INTEREST ON A NOTE ANTEDATED by mistake, which has been paid by the maker, may be recovered back, if he did not know that it was an overcharge at the time, although he knew the date which the note should have borne, and might have ascertained the amount of the interest by calculation; nor is his right varied by the fact that he gave a bond and warrant to confess judgment as security for the note, in which the amount was calculated according to the erroneous data. *Id.*

MORTGAGES.

1. MERE CONTRACT TO RECONVEY IS NOT SUCH DEFEASANCE as will convert an absolute deed into a mortgage; for where there is no debt to be secured there can be no mortgage. *Reading v. Weston*, 89.
2. WHERE IT IS DOUBTFUL WHETHER A TRANSACTION WAS INTENDED AS A MORTGAGE, or as a conditional sale, courts of equity incline to consider it a mortgage; but where subsequent acts of the parties are consistent with the idea of a sale, it will be treated as such. *Poindexter v. McCasnon*, 591.
3. APPORTIONMENT OF MORTGAGE DEBT.—One who has a mortgage upon two or more tracts of land, in one of which a third person becomes interested, may be compelled to apportion the debt according to the value of the different tracts, and release to the third person his tract on his paying the proportionate share, or assign the whole mortgage to the third person on his paying the entire sum due. *Chittenden v. Barney*, 672.
4. SAME.—If the third person has become interested by necessity, and not for the purpose of speculation, he may exercise a choice either to take an assignment or have an apportionment. *Id.*
5. THE EQUITABLE SITUATION OF THE PROPERTY at the time the third person became interested must be regarded. *Id.*
6. MORTGAGEE'S RIGHT TO RENT.—Where the time in which the debt secured by a mortgage has passed without payment, the mortgagee, after notice to the tenant, is entitled to recover the rents and profits. *Babcock v. Kennedy*, 695.
7. THE TENANT CAN NOT RECOVER OF THE MORTGAGEE, in such case, the value of articles delivered to, and received by, him for the rent. Nor will the failure of the mortgagee to recover rent in an action against this tenant therefor deprive him of his defense to the action. *Id.*

See ADVERSE POSSESSION, 1; FRAUDULENT CONVEYANCES, 4, 8, 9, 10; POWERS.

MUNICIPAL CORPORATIONS.

THE CITY COUNCIL are, by law, judges of the election of their members. *Mayor v. Morgan*, 232.

See MANDAMUS, 1, 2.

MURDER.

See CRIMINAL LAW, 11, 12, 13, 14, 15.

NE EXEAT.

1. **NE EXEAT CAN BE ISSUED** only when it appears: 1. That there is a precise amount of debt positively due; 2. That it is an equitable demand not suable at law, except in cases of account and some others of concurrent jurisdiction; 3. That the defendant is about quitting the country to avoid payment. *Rhodes v. Cousins*, 715.
2. **NECESSITY OF AFFIDAVITS TO PROCURE WRIT.**—A writ of *ne exeat* can not be granted in this state, except upon a bill filed and affidavits made to the truth of its allegations. *Id.*
3. **NE EXEAT WILL NOT BE GRANTED WHERE BAIL** can be demanded at law. *Id.*

NEGOTIABLE INSTRUMENTS.

1. **GIVING FORGED NOTE IN PAYMENT**, by a partner to a creditor of the firm, after its dissolution, does not extinguish the original liability of the partnership. *Pope v. Nance*, 60.
2. **RETURN OF A NOTE** on which the name of one of the makers was forged is not essential before action on the original demand can be brought, if it appear that the other parties are insolvent and no injury will result to the person transferring the note by failing to return it. *Id.*
3. **IN AN ACTION BY THE INDORSEE** against the immediate indorser, the true consideration for the indorsement is the measure of the recovery. *Cook v. Cockrill*, 67.
4. **BLANK INDORSEMENT BY ONE PERSON OF PROMISSORY NOTE FOR ANOTHER**, payable to a third person, or order, does not import a valuable consideration from the payee to the indorser, nor imply an engagement by the indorser that the maker was of ability to pay, and would pay such note. *Wylie v. Lewis*, 108.
5. **GIVING TIME TO THE DRAWER.**—If a payee of a bill of exchange, accepted for the drawer's accommodation, give time to the drawer without the acceptor's knowledge, the latter is not thereby discharged, though the payee knows all the facts. *Lambert v. Sandford*, 149.
6. **PROMISSORY NOTES—SUBJECT TO WHAT CREDITS.**—A credit once made on a note, but subsequently erased, is evidence, and the obligor is entitled to the benefit of the same, unless disproved or explained, and evidence showing that the money was actually paid as stated in the erased credit is admissible. *Graves v. Moore*, 181.
7. **INSOLVENCY OF MAKER OF PROMISSORY NOTE** does not excuse want of notice of his default, where it is sought to charge the indorser. *Page v. Loud*, 650.
8. **THE PAYOR'S SIGNATURE AFFIXED BY THE NOMINAL PAYEE** to a promissory note will bind the payor. *Haven v. Hobbs*, 678.
9. **IT IS SUFFICIENT CONSIDERATION FOR A NOTE** that it was given for the discharge of bastardy proceedings instituted by the mother against the father, the maker of the note. *Id.*
10. **A RECEIPT EXECUTED BY THE NOMINAL PAYEE** in fraud of the person for whose benefit the note was given is void. *Id.*

See EVIDENCE, 21.

NEW TRIALS.

- NEW TRIAL ON THE GROUND OF NEWLY-DISCOVERED EVIDENCE** will not be granted where the evidence is cumulative. *Whitbeck v. Whitbeck*, 503.

NOVATION.

See SURETYSHIP, 5.

OFFICE AND OFFICERS.

1. JUDGE OF A COURT OF RECORD IS NOT LIABLE in a civil action, even for corrupt misconduct in office. *Cunningham v. Bucklin*, 432.
2. JUDICIAL LIABILITY, CASES CONCERNING, reviewed by Savage, C. J. *Id.*
3. COMMISSIONER IS NOT A JUDGE OF RECORD, who is specially authorized by statute to perform certain duties of a judge of the supreme court in granting discharges to insolvents, though he acts judicially within his jurisdiction. *Id.*
4. MALICIOUS AND CORRUPT CONDUCT IN OFFICE can not be alleged or proved against one acting under a special and limited jurisdiction, in contradiction to his own record, which is made by statute conclusive evidence. *Id.*
5. COMMISSIONER IN INSOLVENCY IS NOT CIVILLY LIABLE for alleged corrupt and malicious misconduct in granting a discharge to an insolvent where he has jurisdiction, and where, the discharge being made by statute, conclusive evidence of the facts therein shows on its face that all the proceedings were regular and correct; as, where it is alleged that the discharge was granted without notice to the creditors, "deceitfully, corruptly," etc., "under color and pretense" that an adjournment had been had from a prior hearing, when there was no such adjournment, but the discharge states that there was a regular adjournment. *Id.*
6. JUSTICE OF THE PEACE WHO EXCEEDS HIS JURISDICTION is liable to an action of trespass for improperly issuing an execution, and causing the property of a person to be seized and sold thereunder. *Kelly v. Rembert*, 643.

PARENT AND CHILD.

1. FATHER ADVANCING HIS CHILD TO WHOM HE IS IN DEBT is presumed to do so with a view to the discharge of the debt, unless the circumstances prove a contrary intention. *Kelly v. Kelly*, 710.
2. CONVEYANCE OF LAND, in such a case, will be presumed in satisfaction of a money debt, if such appears to have been the intention. • *Id.*

See CONSIDERATION, 4; FRAUDULENT CONVEYANCES, 13, 14.

PARTIES.

See EQUITY, 3.

PARTNERSHIP.

1. A PARTNER MAY SUE AT LAW a copartner, for the excess contributed over and above his proportion of the joint stock. *Bumpass v. Webb*, 34.
2. ONE PARTNER CAN NOT MAINTAIN an action against his copartner for personal services rendered for the copartnership. *Causten v. Burke*, 297.
3. PROPERTY CONVEYED TO A PARTNERSHIP VESTS IN THE COMPANY, and not in the individual copartners; and the transfer of such property by one of the partners passes only a contingent right to a part after the debts are paid and the copartnership is ended. *Donaldson v. Bank of Cape Fear*, 577.

See APPLICATION OF PAYMENTS, 3; EQUITY, 7; ESTATES OF DECEDENTS, 1; EVIDENCE, 17, 18; EXECUTIONS, 16.

PATENTS—LAND.

THE FINAL CERTIFICATE OF TITLE, under the act of congress, settling Spanish claims, is sufficient evidence of title, and can not be questioned by a trespasser. *Richardson v. Hobart*, 70.

PAUPERS.

See DOMICILE.

PAYMENTS.

See MISTAKE; PARENT AND CHILD.

PERFORMANCE.

See BONDS, 3; COVENANTS, 2.

PLEADING AND PRACTICE.

1. IN DECLARING ON CONTRACTS, THE RULE IS, if the contract would be good at common law, the declaration need not state that it was in writing; but where the duty or liability is created by statute, and also required to be in writing, then the declaration must aver that the contract was in writing. *Brown v. Adams*, 36.
2. PLEA THAT THE CASHIER WAS ROBBED, in an action on his bond, should set out the place and circumstances of the robbery. *Huntsville Bank v. Hill*, 39.
3. ON A DEMURRER TO EVIDENCE, the court, in its discretion, may compel the party to join in demurrer, or to abandon his evidence. *Brandon v. Huntsville Bank*, 48.
4. TENDER OF PERSONAL PROPERTY at the time and place of delivery may be pleaded in bar to an action on a bond for such delivery, without averring readiness afterwards to deliver it, or to bring it into court. *Mitchell v. Merrill*, 128.
5. THE DECLARATION ON SUCH BOND need not allege demand at the place stipulated for delivery. *Id.*
6. A NOLLE PROSEQUI to the whole declaration is not, like a *retraxit*, a bar to a future action for the same cause. *Lambert v. Sandford*, 149.
7. WHERE ONE OF TWO PLEAS to the whole cause of action be adjudged good on demurrer, the other need not be considered. *Cutler v. Coz*, 152.
8. PRACTICE.—A demurrer being sustained to a declaration containing but one count, and a new count being added as an amendment, to which a plea of not guilty was entered, it was held that the plea applied to the new count only. *Sanders v. Vance*, 167.
9. PRACTICE—CONSENT BY A DEFENDANT that a bill confessed by a co-defendant may be read and taken as evidence against him, is an admission of the allegations of the bill. *Nantz v. McPherson*, 216.
10. AFTER VERDICT, THE ALLEGATIONS OF FRAUD AND DECEIT in the declaration are equivalent to the charge of an actual *scienter*. *Osgood v. Lewis*, 317.
11. AVERMENT OF FRAUD AND DECEIT is immaterial where there is an express warranty. *Id.*
12. SUFFICIENCY OF AVERMENT ON GENERAL DEMURRER.—In a declaration against a defendant for corrupt misconduct as a commissioner under the insolvent act in discharging the plaintiff's debtor, whereby the debt was lost, an averment that after judgment the debtor could not be found to

satisfy the plaintiff is sufficient on general demurrer, without alleging that a *ca. sa.* was issued and returned *non est inventus*. *Cunningham v. Bucklin*, 432.

13. **WAIVER OF OBJECTION TO IRREGULARITY BY JOINING ISSUE.**—A plaintiff waives his objection to the defendants being allowed to appear and plead without giving special bail by joining issue without making the objection, and the appearance bail are discharged. *Culpeper Mfg. Soc'y v. Digges*, 708.
14. **INSTRUCTION THAT THE PLAINTIFF HAS A RIGHT TO RECOVER** if the jury believe the evidence, without saying anything as to the amount of the recovery, is not erroneous if there is uncontradicted evidence establishing the plaintiff's right to any part of his demand. *Pleasants v. Pendleton*, 726.

See CORPORATIONS, 9; FRAUD, 1, 2; RES ADJUDICATA; TRESPASS, 13, 17.

POWERS.

- A MORTGAGE IS AN EXECUTION OF A POWER** to appoint by any writing, in the nature of a will or other instrument, under hand and seal, executed in the presence of two credible witnesses. *Lancaster v. Dolan*, 625.

PRINCIPAL AND AGENT.

See AGENCY.

PRINCIPAL AND SURETY.

See SURETYSHIP.

PROHIBITION.

See WASTE, 2.

REAL ESTATE.

1. **PENDENCY OF AN EJECTMENT FOR A LOT OF GROUND** out of which a rent charge issues, brought by the executors of a testator, will not bar the recovery in an action of covenant for the rent, by the devisees. *Streaper v. Fisher*, 604.
2. **ONE WHO ENTERS UNDER A CONTRACT FOR THE PURCHASE** of lands, and makes permanent improvements, can not, before complying with the terms of the contract, convey to another a title, which, though buying in ignorance of the contract, he can set up against the person with whom it was made. *Bowker v. Walker*, 670.

RELATION.

RELATION TO VOID ACT.—There can be no relation to a void act for the purpose of giving it effect. *Doe v. Howland*, 445.

RELEASE.

See EQUITY, 6.

RENT.

See MORTGAGES, 6, 7; REAL ESTATE, 1.

REPLEVIN.

See TRESPASS, 3.

RES ADJUDICATA.

1. A PLEA OF FORMER RECOVERY is good in bar, if it contains sufficient matter to show that the causes of action in the two suits were the same, and that the merits were determined in the first case. *Cutler v. Cox*, 152.
2. A PLEA OF FORMER RECOVERY to an action on the case founded on a tort, can not be objected to merely because the first action was covenant, the causes of action being the same. *Id.*
3. If A PLEA OF FORMER RECOVERY aver the causes of action to be the same, and the record do not show them to be different, the averment on demurrer to the plea must be taken as true. *Id.*
4. If IN A FORMER ACTION OF COVENANT for the same cause, now made the subject of an action for a tort, accord and satisfaction be pleaded, and issue be joined on a replication, and the defendant recover judgment, it is a good plea in bar to the present action. *Id.*

See TRESPASS, 14, 16.

SALES.

1. SELLER OF PERSONAL PROPERTY is not answerable for any defects in the quality or condition of the article sold, without an express warranty or fraud, but this rule is not universal, as where personalty is sold by sample, etc. *Osgood v. Lewis*, 317.
2. CONSTRUCTIVE DELIVERY BY A VENDOR OF CHATTELS is sufficient to pass the right of property. *Pleasants v. Pendleton*, 726.
3. BARGAIN STRUCK AND PAYMENT OF THE PURCHASE-MONEY vests the property of a chattel in the vendee. *Id.*
4. SALE OF FLOUR IN A WAREHOUSE—DELIVERY.—On a sale of flour in barrels of different brands in a warehouse, where the vendor gives the vendee a bill of parcels specifying the number of barrels of each brand with an order on the warehouseman for their delivery, and receives the vendee's check in payment, giving a receipt in full, the contract is completely executed, and vests the property in the vendee, so that a subsequent loss before actual delivery falls upon him. *Id.*
5. If ANYTHING REMAINS TO BE DONE BETWEEN THE PARTIES to put the articles in a deliverable state, the contract is not complete, and the property does not pass. *Id.*
6. USAGE AS TO COOPERAGE ON SALE OF FLOUR.—Where there is a usage that cooperage necessary on a delivery of flour to the vendee at a warehouse is to be done by the storer at the vendor's expense, it does not constitute a case where something remains to be done by the vendor to complete the contract. *Id.*
7. WAREHOUSE RENT DUE IS NO OBSTACLE TO DELIVERY of the flour in such a case where the usage is to charge it to the vendor, and not to make it a lien on the flour. *Id.*
8. SEPARATION OF ARTICLES SOLD out of a large number, where all are exactly of the same quality, is unnecessary to constitute such delivery as will pass the property; as in the case of a number of barrels of flour sold out of a larger number of the same brand belonging to the vendor and stored in a warehouse. *Id.*
9. USAGE TO SELL FLOUR IN STORE BY ORDER, and to pass it by the transfer of the order from hand to hand, without actual delivery of the flour, is reasonable and lawful. *Id.*

10. WHEN SEPARATION IS UNNECESSARY AS TO PART of the articles included in a contract, though it may be as to the rest, title may pass as to the former, though not as to the latter. *Id.*

See WARRANTY.

SEDUCTION.

See EVIDENCE, 7.

SET-OFF.

See EQUITY, 2, 3.

SHERIFFS.

See EXECUTIONS; MANDAMUS, 2.

SHERIFF'S SALES.

See EXECUTIONS.

SHIPPING.

1. SEAMEN'S WAGES ARE NOT RECOVERABLE IF NO FREIGHT is earned, where the failure is not due to the fault of the master or owners. *Van Beuren Wilson*, 491.
2. LOSS OF FREIGHT THROUGH THE MASTER'S OR OWNER'S FAULT OR FRAUD, as where the ship is seized for a debt of the owners, or is captured and condemned for a violation of neutrality laws, occasions no loss of wages. *Id.*
3. LOSS OF FREIGHT BY A DISASTER OR PERIL ARISING FROM ACCIDENT, or superior force, carries with it the loss of the seaman's wages. *Id.*
4. THAT FREIGHT WAS LOST WITHOUT THE SEAMEN'S FAULT is not enough to entitle them to wages, if there was no fraud or fault on the part of the master or owners. *Id.*
5. CIVIL PROCESS ISSUED AGAINST A VESSEL in a foreign country to try a private right of property therein is not such superior force as to deprive the seamen of their right to wages, though it may break up the voyage, and prevent the earning of freight; for it is the owners' duty to furnish the master with the means of procuring the liberation of the vessel in every such case by giving security. *Id.*
6. UNFOUNDED CLAIMS AND LAW SUITS constitute a peril, the consequences of which should fall exclusively upon the owners. *Id.*
7. DAMAGES FOR LOSS OF WAGES for the return voyage may be recovered where the ship, being unseaworthy, is abandoned to the insurers in a foreign country, though wages *eo nomine* would not be recoverable. *Id.*
8. SEAMAN CAN NOT SUE OWNERS FOR WAGES under the Act of Congress of February 28, 1803. *Id.*

SLANDER.

1. ACTIONABLE WORDS.—Words are not to be taken in their mildest or most grievous sense, but in that sense in which they would be understood by those who heard them, and expressions of suspicion or opinion may amount to slander. *McGowan v. Manifee*, 178.
2. IDEM—COLLOQUIUM.—The words spoken need not designate the person, this may be done by the colloquium. *Id.*

See LIS PENDENS, 1.

SOVEREIGNTY.

1. A STATE can not be sued in her own courts, unless there is an enactment of the legislature, providing the manner and in what courts she may be sued. *Divine v. Harvie*, 194.
2. A STATE can not be made a garnishee, nor can the auditor and treasurer be made parties to a suit, in place of the state, to obtain a warrant and money from the treasurer. *Id.*
3. CREDITOR OF THE STATE can not be compelled, by bill, under the act subjecting choses in action of a debtor to the satisfaction of his creditor's judgment, to assign his warrants on the treasury, or otherwise transfer the demand to his creditor. *Id.*
4. DEMAND ON THE STATE is not a chose in action within the statute mentioned. *Id.*
5. STATUTES—STATE, WHEN AFFECTED BY.—A state is not embraced by an act made to operate between individuals, unless such intention is apparent in the act, and an act subjecting the debts due a judgment-debtor to his creditors, does not embrace a debt due by the state. *Id.*

See EXECUTIONS, 26, 27, 28, 29.

SPECIFIC PERFORMANCE.

SPECIFIC PERFORMANCE, HOW DECREED.—In a decree for specific performance, the same shall be final for a conveyance, and if not complied with, a decretal order appointing a commissioner to execute the decree should be entered. *Sproule v. Winant's Heirs*, 164.

See EQUITY, 17.

STATUTES.

1. ALL LAWS ARE TO ACT PROSPECTIVELY, unless they are clearly expressed to be of retroactive effect. *Perkins v. Perkins*, 120.
2. PUBLIC ACTS OF THE GENERAL ASSEMBLY take effect from its rising, if not otherwise provided; and courts take judicial notice of the time when the session of the legislature terminates. *Id.*
3. DISAGREEING STATUTES SHALL BE CONSTRUED so that both shall have effect, if possible. *McCartee v. Orphan Asy. Soc.*, 516.
4. REPEALS BY IMPLICATION are not favored by the law. *Id.*
5. ACTS IN PARI MATERIA should be construed together as if they were one law. *Id.*
6. THE WORD "PURCHASE," in its most extensive signification, includes a devise. *Id.*
7. STATUTE AUTHORIZING A CORPORATION TO TAKE BY PURCHASE must be construed so as to stand together with the statute of wills prohibiting devises to corporations; hence, in that case, the word "purchase" does not include "devise." *Id.*
8. POWER OF PURCHASE CONFERRED BY SUCH A STATUTE is subject to the restrictions of other general laws. *Id.*
9. RIGHT TO PURCHASE IS INCIDENT to a corporation, and a statute conferring that right does not extend the signification of the term "purchase." *Id.*

See SOVEREIGNTY, 5.

STATUTE OF FRAUDS.

1. LANDLORD AND TENANT.—A parol agreement between a landlord and

tenant, that the latter should surrender the residue of his term in the premises leased to a purchaser, in consideration of which the landlord agreed to give up the rent in arrear, is within the statute of frauds, and void. *Lammott v. Gist*, 295.

2. WRITTEN PROMISE UNNECESSARY, WHEN.—A promise to pay for land actually conveyed need not be in writing. *Whitbeck v. Whitbeck*, 503.

See CONSIDERATION, 1; GUARANTY, 1, 2.

STATUTE OF LIMITATIONS.

1. GENERAL CLAUSE IN WILL DIRECTING ALL JUST DEBTS OF TESTATOR TO BE PAID, will not revive a debt barred by the statute of limitations. *Peck v. Botsford*, 92.
2. ACKNOWLEDGMENT BY EXECUTOR OF DEBT of decedent, barred by the statute of limitations, will not take the case out of the statute. *Id.*
3. QUI TAM ACTIONS.—In actions *qui tam*, the defendants could not have been indebted to the plaintiff before the commencement of the action, consequently a plea that the defendants were not indebted to the plaintiff within three months before the commencement of the action, is insufficient. *Estill v. Fox*, 213.
4. STATUTES OF LIMITATIONS may be relied on in penal actions, under the general issue. *Id.*
5. WHERE THE STATUTE HAD BEGUN TO RUN against an intestate in his lifetime, its operation is not suspended until after administration granted, when the administrator could have taken out letters and sued earlier. *Nicks v. Martindale*, 647.
6. ACKNOWLEDGMENT OF A DEBT is sufficient to take it out of the operation of the statute of limitations, although there has been no new promise. *Glenn v. McCullough*, 661.

See ADVERSE POSSESSION.

SUNDAY.

1. SUNDAY IS DIES NON JURIDICUS by a canon of the church incorporated into the common law, and judicial acts can not be done on that day, though other acts may be, unless prohibited by statute. *Story v. Elliot*, 423.
2. MAKING AN AWARD IS A JUDICIAL ACT, and if done on Sunday is void. *Id.*

SURETYSHIP.

1. NOTICE TO SUE PRINCIPAL given by a surety on a promissory note to the holder, and failure to sue until the insolvency of the principal, is a good defense to an action of debt against the surety, though the notice be not in writing. *Bruce v. Edwards*, 33.
2. ON THE BOND OF A BANK CASHIER, conditioned that he shall, with fidelity and to the best of his skill, etc., conduct himself in said office, "safely and securely keeping all moneys deposited in, etc., refunding and paying over the same when properly required," the sureties are not liable for loss by robbery. *Huntsville Bank v. Hill*, 39.
3. SURETIES ON A BOND FOR WRIT OF ERROR ARE DISCHARGED by the principal's agreeing with the adverse party, without their consent, that the judgment may be affirmed, and that he will deliver indorsed bills for the amount, payable in installments, and that no execution shall be levied, except on non-payment of the bills. *Comegys v. Cox*, 45.

4. **SURETY—HOW RELEASED.**—A surety of a purchaser can not obtain relief against his obligation on the ground of fraud in the sale, unless it appear that his principal and the vendor have combined to defraud him. *Brown v. Wright*, 190.
5. **IDEM**—A NOVATION between the principal and creditor, whereby time is given, to the prejudice of the surety, discharges him; but the new contract should be made clearly to appear, and that it was so prejudicial to the surety in its tendency that the obligee ought to be compelled to rely upon it, and not be allowed to resort again to the surety. *Id.*
6. **SURETY WHO HAS PAID THE DEBT** may compel his co-surety to make contribution; or he may by substitution take the place of the creditor and acquire all his rights against the principal debtor. He can acquire no rights that the creditor did not have, and can not compel a contribution by the representatives of his co-surety against whom the creditor had no remedy. *Waters v. Riley*, 303.
7. **SURETIES ON A JOINT BOND, WHILE LIVING**, are both liable to the creditor of their principal, and one may recover against the other a just proportion of what he is made to pay; but if one dies, the remedy as to him is gone, and the duty and the remedy survive against the survivor. If the survivor pay the debt, his only remedy is against the principal. *Id.*
8. **SURETY MAY RETAIN FUNDS IN HIS HANDS BELONGING TO THE PRINCIPAL DEBTOR**, upon the latter's insolvency; and an assignee of the principal debtor has, in such case, no better right to such funds than his assignor would have. *Williams v. Helme*, 580.

TENDER.

- A **TENDER AND REFUSAL OF PERSONAL PROPERTY**, or what is equivalent thereto, vests the property in the creditor, and puts an end to his right to sue on the contract. *Mitchell v. Merrill*, 128.

See PLEADING AND PRACTICE, 4.

TORTS.

1. **ONE SHOULD SO USE HIS OWN PROPERTY** as not to injure the property of another. But it is only when one deviates, either by intention or neglect, from the ordinary use of his property, that he is liable for an injury done thereby to another. *Durham v. Musselman*, 133.
2. **WHERE AN ACT IS UNLAWFUL**, the actor is liable for an injury done, without reference to the probability that it would occasion that particular injury. *Id.*
3. **WHERE AN ACT IS LAWFUL**, the liability of the actor, for an injury occasioned by it, depends upon the question whether the injury was the natural or probable consequence of the act, or was merely accidental. *Id.*

TRESPASS.

1. **ONE HAVING TITLE MAY MAINTAIN TRESPASS** for cutting timber, without actual possession, no one being in the actual possession. *Gillespie v. Dew*, 42.
2. **TO MAINTAIN TRESPASS**, plaintiff must have possession. *Foster v. Fletcher*, 208.
3. **DISSEISOR CAN NOT MAINTAIN REPLEVIN FOR GRAIN** sown by him on the land of which he has been disseised, which has been cut and removed by the disseisor. *De Mott v. Hagerman*, 443.

4. TRESPASS QUARE CLAUSUM FREGIT would lie in such a case for the first entry, and after a recovery in ejectment, damages would follow for the mesne profits. *Id.*
5. POSSESSION TO MAINTAIN TRESPASS FOR CHATTELS.—Actual or constructive possession is necessary to maintain trespass for taking chattels. *Orser v. Storms*, 543.
6. CONSTRUCTIVE POSSESSION IS, when one has such a right as to be entitled to reduce goods to actual possession at any time. *Id.*
7. OWNER OF CATTLE LOANED to another for an indefinite time, who retains the right of property therein, may maintain trespass for taking them or their increase from the borrower's possession though that possession may have been continued for many years. *Id.*
8. TO JUSTIFY, AS FOR A DISTRESS DAMAGE FEASANT, the defendant must show actual possession of the land trespassed upon. *Id.*
9. PURCHASER OF LAND UNDER A DECREE IN CHANCERY MAY ENTER peaceably and take possession, and may then distrain cattle doing damage on the premises. *Id.*
10. ONE CAN NOT IMPOUND NEAT CATTLE taken *damage feasant* in his inclosure unless the fence he was bound to repair was such as the law required. *Mooney v. Maynard*, 699.
11. THE STATUTES UPON THIS SUBJECT must have been intended to supersede the common law. *Id.*
12. POSSESSION TO MAINTAIN TRESPASS.—One who has bought the timber on a lot belonging to another, and enters and cuts a portion, has sufficient possession to maintain trespass against a stranger, who should cut and carry away some of the timber. *Goodrich v. Hathaway*, 701.
13. AN APPEAL LIES IN SUCH CASE, although the damages claimed do not exceed ten dollars. *Id.*
14. TRESPASS BARRED BY JUDGMENT IN TROVER, WHEN.—A judgment for the defendant in an action of trover or detinue for a chattel is a bar to an action of trespass for the same chattel; for the trespass is waived by bringing trover or detinue. *Hite v. Long*, 719.
15. IN TRESPASS FOR TAKING A CHATTEL the plaintiff may recover both the value of the property and damages for the violence used. *Id.*
16. PLAINTIFF CAN NOT CARVE TWO SUITS OUT OF ONE CAUSE of action. Therefore, where the plaintiff's team was stopped by the defendant, and a horse taken therefrom, it was held that the plaintiff could not bring trover for the horse taken, and trespass for stopping the team and delaying his journey, because it was all one act. *Id.*
17. DECLARATION IN TRESPASS NOT ALLEGING PROPERTY in the plaintiff in the thing taken is bad on demurrer. *Id.*
18. WHAT FORCE OWNER MAY USE TO TAKE HIS PROPERTY.—The owner of a horse, which another's servant has harnessed in his team, and is driving violently away, may stop the team, using no more force than necessary, and retake his horse; and a plea setting forth these facts in an action of trespass by the owner of the team for stopping the same is good, where the plaintiff does not claim property in the horse. *Id.*
19. POSSESSION IS INDISPENSABLE to maintain trespass *quare clausum fregit*. *Truss v. Old*, 748.

See CO-TENANCY, 5; EXECUTIONS, 1, 49; GUARDIAN AND WARD, 5, 6; HIGHWAYS, 3; INJUNCTIONS, 1, 2; JUDGMENTS, 6; MANDAMUS, 2; WASTE, 1, 2.

TROVER.

1. POSSESSION BY THE FINDER OF A LOST ARTICLE is sufficient to entitle him to maintain trover against any one who converts it, except the owner. *Brandon v. Huntsville Bank*, 48.
 2. POSSESSION OF A SLAVE WHO FINDS A CHATTEL, is the possession of his master. *Id.*
 3. TROVER LIES AGAINST AN OFFICER who sells without notice, property seized under process. *Wright v. Spencer*, 76.
 4. THE MEASURE OF DAMAGES in such case is the diminution in price produced by the irregularity of the sale. *Id.*
 5. POSSESSION, COUPLED WITH CLAIM OF TITLE AND ACTS OF OWNERSHIP, is evidence of a conversion. *Dowd v. Wadsworth*, 567.
 6. ONE WHO IS IN POSSESSION OF ANOTHER'S PROPERTY is bound to surrender it upon demand; but if he does not know the owner, claims no property in himself, and is willing to give it up, upon being exonerated, he is not guilty of a conversion. *Id.*
- See CO-TENANCY, 2, 4; DAMAGES, 2; EXECUTIONS, 1, 2, 3, 5; GUARDIAN AND WARD, 7, 8; TRESPASS, 14.

TRUSTS AND TRUSTEES.

1. TRUST ESTATE.—Upon the death of one of two trustees, the entire trust estate does not vest in the survivor, but a moiety of the same vests in the heirs or devisees of the deceased trustee. *Sanders v. Morrison*, 161.
2. *IDEM.*—JUS ACCRESCENDI is destroyed by statute, in Kentucky, in trust estates as well as in all others. *Id.*
3. TRUSTEES AUTHORIZED TO SELL REAL ESTATE and invest the proceeds in stock, are not thereby empowered to exchange the trust property for other real property. *Ringgold v. Ringgold*, 250.
4. CONTRACTS BETWEEN CESTUI QUE TRUSTS AND THEIR TRUSTEES, although not void, are strictly scrutinized by courts of equity in order that no injustice may be done the *cestui que trusts*, and before the same will be upheld, it must appear that the latter were free to act as rational, intelligent men. *Id.*
5. TRUSTEES WHO VIOLATE THEIR TRUST in a sale of the trust property, are liable to the *cestui que trusts* for the utmost value of the property sold, but where the actual value can be clearly ascertained, that is the measure of indemnity. *Id.*
6. SALE OF THE TRUST PROPERTY, by one trustee to his co-trustee, is a breach of the trust, for which both are liable. *Id.*
7. TRUST, WHEN IMPLIED.—Where two persons sold personal property belonging to another, with his assent, and took bonds from the purchasers in their own name, and collected a portion of the purchase-money, a court of equity will infer some conventional arrangement between the parties, in the nature of a trust, which it will enforce. *Id.*
8. COURTS OF EQUITY will never go beyond the allegations in the bill in decreeing relief. *Id.*
9. TRUSTEES LIABLE FOR EACH OTHER'S ACTS.—Co-trustees are bound to watch over the conduct of each other, and to know of the collection of funds belonging to the trust estate; and if one of two trustees fails to apply money collected by him, from a sale of the trust fund, to certain outstanding indebtedness, and the other trustee knows of the receipt of

such money, and makes no effort to have the same so applied, the latter is jointly chargeable for interest with his associate. *Id.*

10. **IDEM—WHEN CHARGEABLE WITH INTEREST.**—If, in the management of the trust fund, the trustees exceed their power, or make unproductive investments, they are chargeable with interest; and if they apply the same to their own use, they are chargeable with compound interest. *Id.*
11. **TRUSTEES ARE CHARGEABLE WITH COMPOUND INTEREST** on the ground of the presumed gain to them, from the use of the trust fund, and, if the circumstances are such as to forbid such presumption, and it appears that they invested the trust fund in good faith, although in violation of their trust, and that they have not derived any profit from such investment, they will not be charged with compound interest. *Id.*
12. **RESTS OF SIX MONTHS ALLOWED TRUSTEES** without interest, to re-invest the same, are not unreasonable. *Id.*
13. **ENGLISH RULE IS, THAT TRUSTEES** are not entitled to any compensation for their services, but the English courts allow them a certain *per diem* under the name of an indemnity. *Id.*
14. **TRUSTEES IN MARYLAND** are allowed the same compensation for their services as are allowed to executors, etc., by statute. *Id.*
15. **PURCHASE OF TRUST ESTATE AT SHERIFF'S SALE** by a fraudulent trustee, pending litigation between him and his *cestui que trust*, confers no title; and the sheriff's deed can stand only as a security for what was advanced upon the execution. *Keaton v. Cobb*, 595.
16. **CESTUI QUE TRUST WHO INCURS COSTS AT LAW** in defending against his trustee a title purely legal, instead of coming at once into the proper forum for redress, can not recover such costs in equity; but he is entitled to repayment of the costs paid to the trustee. *Id.*
17. **PERSONS ACQUIRING TITLE BY FRAUD ARE TRUSTEES** for the injured party. *Coleman v. Cocke*, 757.

USAGE.

See SALES, 6, 9.

VARIANCE.

See CORPORATIONS, 10.

VENDOR AND VENDEE.

VENDEE'S ACQUIESCING IN VENDOR'S FRAUD.—The vendee of a tract of land can not resist the payment of the purchase-price on the ground of fraud and failure of consideration, when it appears that he entered upon and continued in the quiet possession of the land after he discovered the falsity of the representations that it was free from incumbrances. *Christian v. Scott*, 68.

VERDICT.

1. **COURT CAN NOT LOOK BEYOND A SPECIAL VERDICT** for the facts. *La Frombois v. Jackson*, 463.
2. **SPECIAL VERDICT SHOULD FIND MATERIAL FACTS**, and not the evidence of those facts. *Per Jones*, chancellor. *Id.*
3. **SPECIAL VERDICT SHOULD FIND the fact to be decided on**, or evidence which conclusively proves it. *Per Spencer*, senator. *Id.*

4. MISCONCEPTION OF ACTION IS NOT CURED BY VERDICT under our statute of jeofails where the verdict itself is objected to as given under a misdirection. *Truss v. Old*, 748.

VOLUNTARY CONVEYANCES.

1. DEFECTIVE VOLUNTARY CONVEYANCES will not be aided or perfected in equity, and want of consideration is a good defense to a bill for rectifying such conveyances. *Dawson v. Dawson*, 573.
2. WHERE RIGHTS ARE VESTED BY EXECUTED VOLUNTARY CONVEYANCE, a court of equity will recognize and protect such rights. *Id.*
See EQUITY, 16; FRAUDULENT CONVEYANCES, 5, 6, 15.

WAGERS.

1. WAGERS CONTRARY TO PRINCIPLES OF MORALITY or sound policy are not recoverable. *Rust v. Gott*, 497.
2. WAGER ON THE RESULT OF AN ELECTION IS ILLEGAL, though made after the election but before the canvass is completed; because the tendency is to promote inquiry into the legality of elections, and thus to excite discontents and possible disturbances among the people. *Id.*

WARRANTY.

1. WARRANTIES, ON THE SALES OF PERSONALTY, are of two kinds: express and implied. *Osgood v. Lewis*, 317.
2. EXPRESS WARRANTY, WHAT IS.—Any affirmation of the quality or condition of the thing sold, not uttered as matter of opinion or belief, made by the seller at the time of the sale, for the purpose of assuring the buyer of the truth of the fact affirmed, and inducing him to make the purchase, if so received and relied on by the purchaser, is an express warranty. *Id.*
3. EXPRESS WARRANTY—HOW DETERMINED.—If the facts relied upon to prove an express warranty rest in parol, it is the province of the jury to determine whether such facts amount to an express warranty; but the court must determine whether an agreement in writing contains an express warranty or not. *Id.*
4. IMPLIED WARRANTIES arise by operation of law, and they exist without any intention of the seller to create them. They are conclusions or inferences of law, pronounced by the court upon facts admitted or proved before the jury. *Id.*
5. IMPLIED WARRANTIES ARE OF TWO KINDS.—1. Those untinged by actual fraud or deceit, as a warranty of title; 2. Those where fraud and deceit are their very essence; as where a seller, knowing of the unsoundness of an article, uses artifice to conceal such defect from the buyer. *Id.*
6. A STATEMENT IN A BILL OF PARCELS FOR A QUANTITY OF OIL, that it was "winter-pressed sperm oil," is an express warranty by the vendor, that such oil was winter-pressed. *Id.*

WASTE.

1. WASTE AND TRESPASS DISTINGUISHED.—Waste is the abuse or destructive use of property by him who has not an absolute, unqualified title; trespass is an injury or unauthorized use of another's property by one who has no right whatever. *Duwall v. Waters*, 350.

2. **COMMON LAW REMEDIES AGAINST WASTE** were: A prohibition commanding the sheriff to prevent its being done, and a writ of waste after the injury had been done to recover the place wasted and treble damages. *Id.*
3. **NO COMMON LAW PROCESS TO PREVENT TRESPASS**.—There was no process at common law to prevent a threatened trespass upon realty, however great or irreparable. *Id.*
4. **WRIT OF ESTREPEMENT** lay at common law in aid of an action to recover real property to prevent any injury being done thereto pending the controversy. This remedy is corrective as well as preventive; for if the prohibition is violated the plaintiff may recover damages. *Id.*
5. **THIS WRIT IS TREATED AS A REMEDY AGAINST WASTE**, but where there is no privity of title between the parties in the action to which it is auxiliary, the injury which it seeks to prevent is, in chancery acceptation, trespass rather than waste. *Id.*
6. **EVENTUAL WASTE** is that done by an admitted particular tenant after the institution of a suit involving the title, or a partition suit. *Id.*
7. **JURISDICTION IN CASE OF WASTE**.—The subject of waste has passed almost exclusively into the cognizance of the court of chancery in this state. *Id.*
8. **INJUNCTION LIES TO STAY WASTE** whenever an action of waste would lie, whether there is any privity of title or not, and in other cases where such an action could not be brought. *Id.*
9. **CASES OF INJUNCTION AGAINST WASTE** discussed by the chancellor. *Id.*
10. **INJUNCTION AND ACCOUNT OF PAST WASTE** may be sought in one suit, but a bill for an account of waste will not lie where an injunction can not be asked or granted. *Id.*
11. **IN ENGLAND AN INJUNCTION TO STAY WASTE** will be granted where there is a subsisting privity of title or contract admitted by the answer, or an uncontroverted legal or equitable title in the plaintiff; but not where the bill states that the defendant relies upon an alleged adverse title in himself, or where the plaintiff's title is positively denied by the answer. *Id.*
12. **TO PREVENT WASTE, PENDING A SUIT** to determine a title, the only remedy in England seems to be the writ of estrepement, which has fallen into disuse; although in a variety of other cases the court of chancery exercises its conservative power to protect the subject of litigation from waste, injury, or loss, pending a suit. *Id.*
13. **INJUNCTION TO STAY WASTE PENDING LITIGATION LIES IN THIS STATE** wherever an action at law or suit in equity has been brought in which the title has been or may be drawn in question, whether the subject of the controversy be realty or personalty. *Id.*
14. **PRIVITY OF TITLE OR CONTRACT IS UNNECESSARY** to support the injunction in such cases. *Id.*
15. **SUCH INJUNCTION IS AUXILIARY TO THE SUIT OR ACTION** involving the title, and follows its fate. *Id.*
16. **DENIAL OF THE PLAINTIFF'S TITLE IN THE ANSWER** does not warrant the dissolution of an injunction against waste pending the suit. *Id.*
17. **ORDINARY USE AND CULTIVATION ARE NOT INHIBITED** by such an injunction. *Id.*
18. **SEPARATE BILL FOR AN INJUNCTION AGAINST WASTE**, pending a suit here

to try the title, is irregular; the relief should be sought by a petition in the original suit. *Id.*

WILLS.

1. DEVISE WITH POWER TO CONVEY IN FEE carries a fee, but a devise with power to devise in fee carries only a life-estate. *Doe v. Howland*, 445.
2. DEVISE IS DIRECT, WHEN.—Where a testator devised an estate to one upon the death or marriage of his, the testator's, child, or upon such child's attaining his majority, upon the contingency taking place, the devise is direct to the devisee, although the will vests the legal estate in the executors, in trust, to receive the rents and profits for the child's benefit until it shall attain twenty-one, or marry. *McCartee v. Orphan Asylum Society*, 516.
3. IDEM.—If, in such a case, there is a subsequent direction in the will that on the child's marrying or attaining twenty-one, the executors shall sell the realty, and pay one half the proceeds to such child, and the other half to the residuary devisee, the legal estate will remain in the executors until the trusts are performed, but upon the death of the child before attaining twenty-one, the estate vests directly in the residuary devisee under the devise. *Id.*
4. DEVISE TO A CORPORATION IS VOID by the statute of wills. *Id.*
5. DEVISE TO A NATURAL PERSON in trust for a corporation, held valid by the chancellor, and not questioned by the court of errors. *Id.*
6. WHERE INTENTION OF TESTATOR can not be literally fulfilled, a trust results for the heir or next of kin; the doctrine of *cy pres* does not prevail in North Carolina. *McAuley v. Wilson*, 587.
7. WHERE TESTATOR BEQUEATHED PROPERTY for the support of a minister who was to preach to a congregation at a certain meeting-house, but the congregation of such meeting-house refused to allow such minister to preach in their meeting-house, the bequest fails, although the party to whom such minister belonged offered to build another church near the one named by the testator. *Id.*

See STATUTE OF LIMITATIONS, 1.

WITNESSES.

See EVIDENCE, 2, 10.





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